Supreme Court of the United States

OCTOBER TERM, 1920.

No. 46.

INTERNATIONAL BRIDGE COMPANY

PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR

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Attorneys for Petitioner.

ADELBERT MOOT,
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WILLIAM L. MARCY and
HELEN Z. M. RODGERS.
Of Counsel.

Supreme Court,

OF THE UNITED STATES

INTERNATIONAL BRIDGE COMPANY. *Plaintiff in Error,* AGAINST PEOPLE OF THE STATE OF NEW YORK, *Defendant in Error.*	

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR

Description and Location of International Bridge.

The International Bridge is a structure 3494 feet, or about two-thirds of a mile long, extending across the Niagara River from the City of Buffalo to Canada. It consists of three parts, (1) a double track railroad bridge 432 feet long across Black Rock Harbor so-called, which is really the east branch of the Niagara River, improved and converted into a ship canal by the Federal Government; (2) trestle work 1167 feet in length across Squaw Island, filled in so as to present the appearance of a solid embankment and supporting two railroad tracks; (3) a single track railroad bridge 1895 feet long across the west branch and

main channel of the Niagara River along which the International boundary line runs. (Record page 298, folios 382-383)

CHRONOLOGY

For the convenience of the Court, we assemble the important dates in the history of the bridge.

1857: A special act of the New York Legislature (Chapter 753, Laws 1857) incorporated the Bridge Company and a corporation of the same name was created by Act of the Dominion of Canada for like purposes, (Chapter 227, 20th Victoria). Both acts provided for a bridge from Buffalo to Canada. Neither provided for access to Squaw Island. The New York Act provided "said bridge *may* be constructed as well for the passage of persons on foot and in carriages, and otherwise, as for the passage of railroad trains." The Canadian Act substituted the word *"shall"* for *"may"*.

1869: Acts passed by the New York Legislature (Chapter 550, Laws 1869), and Dominion Parliament (Chapter 65, 32nd. and 33rd. Victoria) authorized the consolidation of the two corporations into a single corporation possessing all the rights, privileges and franchises, and subject to all the disabilities and duties of each of such corporations. The corporations were accordingly consolidated.

1870: Act of Congress authorized the construction of the bridge and imposed additional conditions and requirements (Act June 30, 1870, Ch. 176).

1870-1874: Bridge constructed as a railroad bridge exclusively without provision for footway or roadway, original plans including such footway and roadway having been modified.

1874: Act of Congress approved modification in the plans and declared bridge *as constructed* to be a lawful structure. (Act of June 23, 1874, Ch. 475).

1881: Decision of Ontario Court of Appeal that provision in Canadian Act of 1857 for footway and roadway was permissive, not mandatory, notwithstanding the use of the word "shall"; also holding that the work was within the jurisdiction of the government and Parliament of Canada, and the Attorney General of Ontario was not the proper party to file an information seeking in effect to compel a specific performance of the Act of Parliament.

1899: Superstructure of bridge rebuilt. Plans approved by Secretary of War showing footway and roadway across bridge from Buffalo to Canada, but no access to Squaw Island. Footway and roadway omitted in rebuilding because piers would not stand additional widening.

1901: Change in plans reported to War Department, which acquiesced therein. (Decision Finding X, p. 57-58).

1902-1910: Black Rock Harbor improvement undertaken and carried out by Federal Government.

1904: Act of New York legislature (Laws 1904, ch. 373) authorizing the conveyance of lands under Black Rock Harbor, etc. to the United States.

1905: Deed from State of New York to the United States of lands under Black Rock Harbor, etc.

1907: Notice from Secretary of War to International Bridge Company requiring it to reconstruct Black Rock Harbor span of bridge.

1909: Plans for reconstruction of Black Rock Harbor span showing provision for future roadway "not to be put in at present" and making no provision for access to Squaw Island, approved by Secretary of War.

1915: Act of New York Legislature, approved May 22nd. (Laws 1915 Ch. 666), required construction of roadway and pathway giving a passageway between Squaw Island and the main land, to be completed by January 1st., 1916, under penalty of $50 per day for each day in default, and fixed rates for the use of said roadway and pathway.

1915: (December 6th.) Completion of Black Rock Harbor span of bridge according to plans reported to War Department by Engineer Officer in Charge.

1916: (January 11th.) Action commenced by State of New York against Bridge Company to recover penalty of $50 per day for non-compliance with Chapter 666 of the Laws of 1915.

International Character of Niagara River.

The Niagara River, as an international boundary stream, has been regulated by treaties between the United States and Great Britain from the time our nation set up an independent government.

The Definitive Treaty of Peace concluded in 1783 between the United States and Great Britain traced the boundaries of the infant nation * * * "through the middle of said lake (Lake Ontario) until it strikes the communication by water between that Lake and Lake Erie; *thence along the middle of said communication into Lake Erie.*" (Article II).

The Jay Treaty of '94 provided:

> "It shall at all times be free to His Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's Bay Company, only excepted), and to navigate all the lakes, rivers, and waters thereof, and freely to carry on trade and commerce with each other." (Article III).

Doubts having arisen as to the effect upon the Jay Treaty of a subsequent treaty between the United States and certain Indian tribes requiring traders at Indian camps to be licensed by the United States, an explanatory article was added in 1796, reasserting the above provisions of Article III of the Jay Treaty.

The Treaty of Ghent of 1814 provided for the more definite designation of the International

boundary line along the border lakes and rivers, and commissioners appointed for this purpose made their report in 1822 declaring the true boundary intended by previous treaties to be "up the middle of said river (Niagara) to the Great Falls; thence up the Falls, through the point of the Horse Shoe, keeping to the west of Iris or Goat Island, and of the group of small islands at its head, and following the bends of the river so as to enter the strait between Navy and Grand Islands; thence along the middle of said strait to the head of Navy Island; thence to the west and south of and near to Grand and Beaver Islands, and to the west of Strawberry , *Squaw* and Bird Islands to Lake Erie."

In 1818, a Presidential proclamation was issued founded upon an agreement between the United States and Great Britain limiting the naval forces to be maintained by the respective governments on Lake Ontario and the Upper Lakes.

In 1850, Horse Shoe Reef, at the outlet of Lake Erie into the Niagara River, was ceded to the United States by Great Britain for the purpose of a lighthouse for the protection of navigation concentrating at Buffalo and that passing through the Welland Canal—"*provided no fortification be erected on said reef*", and was accepted by the United States on that condition.

In 1908, the United States and Great Britain, by treaty, conferred upon the existing International Waterways Commission, constituted by concurrent action of the United States and the Dominion of Canada, authority to ascertain and

re-establish accurately the location of the International boundary line through the Great Lakes and communicating waterways in accordance with the description of such line in the Definitive Treaty of Peace, with such deviations as might be required on account of the cession by Great Britain to the United States of a portion of Horse Shoe Reef for the lighthouse erected there.

In the same year was also concluded a "Treaty Concerning Fisheries in the United States and Canadian Waters," including specifically Niagara River and Lake Erie, and providing that the time, seasons and methods of fishing in said waters "shall be fixed by uniform and common international regulations, restrictions and provisions", and further—"The two governments engage to put into operation and to enforce by legislative and executive action * * * * the regulations, restrictions and provisions with appropriate penalties for all breaches thereof."

In the same year a "Treaty in Reference to Reciprocal Rights of the United States and Canada in the Matter of Conveyance of Prisioners, and Wrecking, and Salvage," was concluded, providing in substance, that any officer of the United States, or of any state, having in his custody a person charged with or convicted of certain offenses committed in the United States, might convey such person through any part of Canada to a place in the United States, subject to certain regulations, and containing reciprocal provisions in favor of Canada. This treaty further provided that vessels and wrecking appliances, either from

the United States or Canada, might salve property and render assistance to any vessels wrecked or disabled in the waters or on the shores of the other country, in specified boundary waters, including the Niagara River.

The Treaty of 1910 Concerning Boundary Waters has been already considered under Point VI of our original brief (pp. 130-135).

It thus appears that the treaty power has been consistently exercised over the Niagara River since 1783, in relation to a wide diversity of subjects, including the location of the International boundary, the national defense, the protection and freedom of commerce and navigation, freedom of intercourse across the boundary, fisheries, the conveyance of prisoners, wrecking and salvage of vessels and the diversion of water for power purposes.

The words used by this court in sustaining the Migratory Bird Act, passed by Congress pursuant to the treaty between the United States and Great Britain, are applicable here:

> "Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power."
>
> *Missouri vs. Holland, U. S.;* 40 *Sup. Ct. Rep.* 382.

The Franchise to Bridge the Niagara was Conferred by Congress.

Without repeating the argument on this point in our original brief, we desire to summarize our

contention and refer to recent decisions and legislation which emphasize the error of the New York Court of Appeals upon this point.

The franchise to bridge the Niagara was derived from the Acts passed by Congress and not from the legislation of New York State, because Congress alone was competent to grant such a franchise.

The New York Court of Appeals was misled by the form of the original Act of Congress in 1870, declaring "that any bridge and its appurtenances which shall be constructed * * * * * in pursuance of" the New York legislation then in force "shall be a lawful structure", overlooking the fact that this very act imposed further conditions and requirements not found in the New York acts, and hence constituted an independent exercise of the plenary power of Congress over the subject matter. The Court of Appeals likewise completely ignored the Act of Congress of 1874, after the completion of the bridge, declaring the bridge *as constructed*, to be a lawful structure, though not in accordance with the New York legislation as now construed by the learned Court. The Court said in its opinion in this case:

> "The charter thus obtained by defendant (from the State of New York) was confirmed by the Congress of the United States." (223 N. Y. 137, 141).

The error of the Court in thus treating as a mere confirmation or assent what was in fact the original grant of power from the only authority

capable of conferring it, is emphasized in the recent opinion of the same Court in *People v. Hudson River Connecting Railroad Corporation*, 228 N. Y. 203. In that case a New York corporation had sought and procured from the state a franchise to bridge the Hudson River at a point where both banks were within the State of New York. Subsequently, the corporation procured an Act of Congress authorizing the construction of such bridge, and plans for the same were approved by the Secretary of War. The Court of Appeals properly held that the State could not thereafter, by amendment, impose new or other regulations or requirements as to the construction of the bridge, because—"The State connot make unlawful that which Congress under its plenary power has declared to be lawful". Obviously it became necessary for the Court to distinguish its decision in the case at bar, which it proceeded to do as follows:

> "Upon the argument of this case, much emphasis has been laid upon the decision of People v. International Bridge Company (223 N. Y. 137). That case is clearly distinguishable from the present one in that Congress had not exercised its plenary power and authorized the construction of the International Bridge. The act of Congress passed in 1870 merely provided. "That any bridge and its appurtenances which shall be constructed across the Niagara River from the City of Buffalo, New York, to Canada, in pursuance of the provisions of an act of the

Legislature of the State of New York entitled 'An Act to incorporate the International Bridge Company,' * * * shall be lawful structures and shall be so held and taken and are hereby authorized to be constructed and maintained as provided by said act and such amendments thereto, anything in the laws of the United States to the contrary notwithstanding."

This was merely a consent to the bridge as authorized by the state of New York in the charter and a waiver of objections which might be raised by the United States. *By this act nothing was granted to the bridge company by the United States. Its franchise depended wholly upon the New York act* and that act, being an act of incorporation, was subject to amendment under the provisions of article VIII, section 1, of the New York State Constitution, provided such an amendment did not conflict with constitutional rights. (People v. O'Brien, 111 N. Y., 1.)

Congress by the act referred to consented to any bridge constructed at this place under the charter of the International Bridge Company and declared any such bridge lawful and *bestowed the control of that bridge upon the legislature of the state of New York.* The consolidating act of New York made provision that the bridge "shall be as well for the passage of persons on foot and in carriages and otherwise as for the passage of trains." This is mandatory, must be complied

with and insistence upon this charter requirement by the state does not violate any right of the corporation. The legislature, under its right to amend, amended the charter in 1915, and imposed a penalty upon the corporation for its failure after January 1, 1916 to build a roadway for vehicles and a pathway for pedestrians and this amendment was held valid. This was the decision of the International Bridge Case so far as is pertinent to the present appeal." (*Italics ours*).

Passing the points already made in our original brief (pp. 24-32) that a company organized to construct and operate an international bridge between the United States and Canada is under no duty to construct and operate a local bridge between Buffalo and Squaw Island, and that the obligation to maintain a footway and roadway was derived from a Canadian act operative only in Canadian territory, which in the words of another court in a similar case, could not be brought across the river into the United States "even on a bridge," (*Evansville & H. Traction Co. vs. Henderson Bridge Co.*, 134 Fed. 973, 975), and such Canadian Act made no provision for a passage way between Buffalo and Squaw Island, the error in the reasoning of the Court of Appeals consists in their having paid too great regard to the form of the Act passed by Congress in 1870 in distinction to its essence. Because Congress, for convenience, referred to the New York legislation, which provided in detail for the construction of the bridge, and

adopted these requirements as its own, except where it specifically modified them, the Court assumed that Congress surrendered its jurisdiction over this bridge to the State of New York,—notwithstanding that by the same Act Congress expressly reserved to the Federal Court jurisdiction to prevent discrimination in the use of the bridge by railroads, and by the Act of 1874 expressly approved the modification in plans and legalized the bridge as constructed.

The Court here fell into fundamental error. *The question is not of the form of legislation, but of the power to legislate.*

Congress may not transfer its legislative powers to a state, but it may adopt a state law as its own when it is one that it would be competent for it to enact for itself, and give it the same validity as if provisions had been especially made by Congress (*Gibbons v. Ogden*, 9 Wheat. 1, 207, *In Re Rahrer*, 140 U. S. 545, 560; *Franklin v. United States*, 216 U. S. 559, 568). This is what Congress did in this case by the Act of 1870. But it expressly limited its adoption to "acts of said legislature *now in force*" (see *U. S. v. Paul*, 6 Pet. 141), thereby negativing any notion that it delegated its powers or bestowed the control of the bridge upon the Legislature of New York. Of course, such adoption did not extend to the act passed by the New York legislature in 1915, the constitutionality of which is now challenged. And when, in 1874, Congress relieved the Bridge Company of certain of the requirements of the New York Acts adopted by it in 1870 (as such acts are now construed

by the Court of Appeals), by approving the modification of plans consisting in the omission of the footway and roadway, and declaring the bridge a lawful structure *as constructed*, such requirements of the New York acts ceased to have any force. As this Court said of an act permitting State prohibition to apply to movements of liquor from one state into another—"the will which causes the prohibition to be applicable is that of Congress since the application of state prohibitions would cease the instant the act of Congress ceased to apply." (*Clark Distilling Co., v. Western Maryland Railway Co.* 242 U. S. 311.)

The bridging of Niagara River is a matter inherently international, properly subject to the Treaty power, and in the absence of the exercise of that power, committed exclusively to the discretion of Congress acting in conjunction with the Dominion (not the Provincial) Parliament of Canada.

> "A question like this respecting the boundaries of nations is, it has been truly said, more a political than a legal question."

(Chief Justice Marshal in *Foster v. Neilson*, 2 Peters 253, 309).

Congress could not if it would, "bestow the control of the bridge upon the state of New York," as stated by the Court of Appeals. Congress is not permitted thus to delegate to the states powers entrusted to it by the Constitution for the very reason that the states were deemed incompetent properly to exercise them.

As to matters essentially international in character, and affecting the foreign relations of the government, such as the creation and use of a pathway between our soil and foreign territory, no action, or inaction, on the part of Congress could confer jurisdiction upon the State.

In the very recent case decided by this Court involving the power of Congress to delegate to the states the right to enact compensation laws in respect to the injury to persons in maritime employment, this Court held that the definite object of the grant of Congress of power to legislate concerning rights and liabilities within the maritime jurisdiction, was to commit direct control to the federal government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union. This court said:

> "Concerning the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended or changed except by legislation which embodies both the will and deliberate judgment of congress. The subject was intrusted to it to be dealt with, according to its discretion—not for delegation to others. To say that because congress could have enacted a compensation act applicable to maritime injuries, it could authorize

the states to do so as they might desire, is false reasoning. Moreover, such a authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated, but actually established—it would defeat the very purpose of the grant. * * * * Congress cannot transfer its legislative power to the states,—by nature this is non-delegable."

Knickerbocker Ice Company v. Stewart, 252 U.S.—; U. S. Supreme Court Advance Opinions No. 15, (June 15, 1920) page 526.

If Congress cannot delegate to the states its legislative power over matters of international concern even when it has clearly expressed its will and intention so to do, *a fortiori*, no inference should be indulged of such surrender of jurisdiction where Congress has expressed no such intention.

Even where Congress has not acted, the state cannot impose conditions upon commercial intercourse with a foreign country nor exact a license fee as consent thereof, though such intercourse be carried on by ferriage, which is traditionally subject to state control.

City of *Saulte Ste. Marie v. International Transit Company*, 234 U. S. 333.

That Congress by no means intended to relinquish to the State of New York its powers over

the bridging of the Niagara is illustrated by legislation recently passed by it creating a commission to inquire into the feasibility and expense of the construction of a public bridge from Buffalo to Canada and to devise a plan for the construction of such bridge and the manner of financing its construction. (Act of January 30, 1920, Chapter 128).

In like manner Congress recently gave its solemn consent to compacts between the States of New York and New Jersey for the construction of an interstate tunnel under the Hudson River between Jersey City and New York, which was already authorized and provided for by legislation in both states. In so doing, Congress expressly reserved the right to alter, amend or repeal said consent. (Act of July 11, 1919, Ch. 11, Stats. 66th. Congress 199, page 158).

Even where the commerce is interstate and not international, the state is without power to compel a railroad car-ferry, forming a link in an interstate railroad line, to accept a license requiring it to carry on a local ferriage business across a stream which is a boundary between two states because this would be a direct burden on interstate commerce.

St. Clair County v. Interstate Transfer Company, 192 U. S. 454-469-470.

The requirement that an interstate railroad car ferry should operate a local passenger ferry service, presents a very close analogy to the requirement that an international railroad bridge shall

construct upon the same piers as the existing bridge and operate a local passenger bridge. The present case is the stronger in two respects, (a) the commerce affected is international instead of interstate, and hence involves political considerations which are not involved in interstate commerce, as illustrated by the fact that such commerce across and along the Niagara River has been the subject of treaty between Great Britain and the United States. (Jay Treaty of 1794, Article 3; Treaty of 1908 in Reference to Reciprocal Rights in the Matter of Conveyance of Prisoners, etc.; Treaty of 1910. Concerning Boundary Waters). (b) The International Bridge was constructed under a direct franchise from Congress, whereas the interstate car ferry involved in the above case was not operated under such a franchise.

The Franchise to Bridge the Niagara being Derived Solely from Congress, Cannot be Regulated, Impaired or Interfered with by the State of New York.

It is immaterial that the Bridge Company was organized, and later consolidated with the Canadian company, pursuant to acts of the New York Legislature concurrently with acts of the Dominion of Canada, and that the New York act assumed to grant a franchise to bridge the Niagara, for such grant was without power. In discussing the power of the State of California to tax federal franchises conferred upon a California corporation, this Court said:

"If, therefore, the Central Pacific Railroad Company is not a federal corporation, its most important franchises, including that of constructing a railroad from the Pacific Ocean to Ogden City, were conferred upon it by Congress.

It cannot at the present day be doubted that Congress under the power to regulate commerce among the several States, as well as to provide for postal accomodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. * * * Of course the authority of Congress over the Territories of the United States, and its power to grant franchises exercisible therein, are, and ever have been undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, *and employing the agency of state as well as federal corporations.* See Pacific Railroad Removal Case, 115 U. S. 1, 14, 18.

Assuming, then, that the Central Pacific Railroad has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the State. They were granted to the company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? * * * * In our judgment, it cannot." * * * * *

"*Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State.* The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it, is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty."

(*Italics ours*).

California vs. Pacific R. R. Co., 127 U. S. 1, 39, quoted with approval in *Wilson vs. Shaw*, 204 U. S. 24, 33.

United States vs. Stanford, 161 U. S. 412, 432.

Southern Pacific R. R. Co. vs. United States, 183 U. S. 519, 527.

Where the United States has declared an International Bridge as constructed to be a lawful structure, a mandate from the state compelling changes in, or additions to the structure so approved, is surely, in the words of this Court, not only derogatory to the dignity, but subversive of the powers and repugnant to the paramount sovereignty of the government.

The Constitution of the United States makes the Federal Government the supreme and only master over all waters like the Niagara River that are international boundaries, and necessarily over ferries across them, or bridges over them, and it cannot be possible that the legislature of New York, or Texas, or any other state, can lawfully subject a bridge company to an ever increasing fine if it does not also obey the orders, or legislative acts of the state, imposing heavy additional burdens upon its own terms as to the same bridge. The war powers of the Federal Government might have to be exercised upon such an International Bridge, and surely its owner could not prevent such exercise by pleading that it had constructed or added to such bridge by command of a state at great expense, or even loss, for the benefit of the people of some part of such state. It is of supreme importance to the Federal Government, as well as to the International Bridge Company, that the paramount power of the Federal Government should not be impaired in such cases by decisions like that of the New York Court of Appeals now here for review. The situation is one that requires not merely *paramount*, but *ex-*

clusive control by Congress and the treaty making power.

Respectfully submitted,

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INTERNATIONAL BRIDGE COMPANY,
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Exhibits for Plaintiff in Error

MOOT, SPRAGUE, BROWNELL & MARCY,..
Attorneys for Plaintiff in Error.

ADELBERT MOOT,
Of Counsel.

DEFENDANT'S EXHIBIT 7

THIS INDENTURE, Made the 18th day of May, in the year 1871, between the "Niagara River Hydraulic Company," a corporation existing by virtue of the laws of the State of New York, party of the first part, and the "International Bridge Company," a corporation existing by virtue of the laws of the State of New York, and of the Dominion of Canada, party of the second part,

WITNESSETH: That the said party of the first part in consideration of the sum of $1000.00 lawful money of the United States of America, to it duly paid, has bargained and sold, and by these presents does bargain, sell, grant and convey, to the said party of the second part, and its successor or successors and assigns forever, all that certain piece or parcel of land situate, lying and being in the City of Buffalo, County of Erie and State of New York, and being composed of a part of SQUAW ISLAND, in the Niagara River. The said piece or parcel of land extends across the said Island, from the Niagara River easterly to Black Rock Harbor, and embraces 68½ feet on the right or south side and 51½ feet on the left or north side of a certain centre line as the same is located: the said central line is described as follows: that is to say, commencing at a point on the west side of the said Squaw Island, at the low water line of the Niagara River, where it is intersected by the centre line of the International Bridge, as the same is located and established; thence in an east-

erly direction on a tangent, said tangent being a continuation or extension of the said centre line of the International Bridge, for a distance of 352 feet more or less; thence in an easterly and northerly direction, on a curve, described with a radius of 1910 feet, and turning to the left for a distance of 858½ feet measured along said curve; thence in a northeasterly direction on a tangent to the curve above described for a distance of 102 feet more or less, to Black Rock Harbor, containing Three acres and 61|100 of an acre be the same more or less. With the appurtenances and all the estate, right, title and interests of the said party of the first part in and to the same and every part thereof.

It is mutually understood and agreed by and between the parties to this indenture, signified by its execution and acceptance, that the said party of the first part and its successors and assigns, shall have the right in common with the public at large, to use the bridge to be erected and maintained by the party of the second part, upon the premises above described, and across the water at either end of the main shores of the Niagara River, upon paying therefor the tolls and charges allowed by law. And further that all reasonable and proper rail and other connection may be made with such bridge and with the railroad to be laid thereon, by means of proper switches as shall be required by the party of the first part, its successors or assigns, for the improvement of Squaw Island or any part thereof, and the ingress and egress required thereby, for the business which

may be transacted upon the same; it being expressly understood, however, that such connections shall be made at the sole expense of the party desiring the same, and without expense to the party of the second part, its successors or assigns, and in such mode and manner as shall not interfere with the regular business of said bridge, and without damage thereto, or to the railroad laid upon the same, or its appurtenances. And the said party of the first part does hereby covenant and agree, that at the delivery hereof, it is the lawful owner of the premises above granted, and seized thereof by a good and indefeasible estate, in fee simple, clear of encumbrances, and that it will warrant and defend the above granted premises in the quiet and peaceable possession of the party of the second part, its successors and assigns forever.

In Witness Whereof, the said party of the first part has hereunto on the day and year first above written, set its corporate seal in execution hereof, by virtue of a resolution of its Board of Directors, and caused the same to be attested by the signatures of its President and Secretary.

(Signed)

The Niagara River Hydraulic Company,

(L.S) Samuel L. M. Barlow, President.

Attest:

L. Johnston, Secretary.

[$100 Rev. Stamp Cancelled.]

City and County of New York, ss:

On this 19th day of May in the year 1871 before me personally appeared Lawrence Johnston Secretary of the Niagara River Hydraulic Company with whom I am personally acquainted who being by me duly sworn said that he resided in the City of New York; that he was the Secretary of the Niagara River Hydraulic Company, that he knew the corporate Seal of the said Company; that the Seal affixed to the foregoing Instrument was such Corporate Seal that it was so affixed by order of the Board of Directors of the said Company and that he signed his name thereto by the like order as the Secretary of the Company. And the said Lawrence Johnston further said that he was acquainted with Samuel L. M. Barlow and knew him to be the President of said Company, that the signature of the said Samuel L. M. Barlow subscribed to the said Instrument was in the genuine handwriting of the said Samuel L. M. Barlow and was thereto subscribed by the like order of the said Board of Directors and in the presence of him the said Lawrence Johnston.

In Witness Whereof I have hereunto set my hand and affixed my official Seal the said 19th day of May in the year 1871.

(L. S.) William A. Dumphy,

Notary Public
N. Y. County

State of New York
City and County of New York } ss.

I, Charles E. Loen, Clerk of the City and County of New York and also Clerk of the Supreme Court for the said City and County; the same being a Court of Record Do Hereby certify that William A. Dumphy whose name is subscribed to the Certificate of the proof or acknowledgment of the annexed Instrument and thereon written, was at the time of taking such proof or acknowledgment a Notary Public in and for the City and County of New York, dwelling in the said City commissioned and sworn and duly authorized to take the same. And further that I am well acquainted with the handwriting of such Notary and verily believe that the signature to the said Certificate of proof or acknowledgment is genuine.

In Testimony Whereof I have hereunto set my hand and affixed the Seal of the said Court and County the 29th day of May 1871.

(L. S.) Charles E. Loen Clerk

Recorded & Ex'd. June 6th 1871
at 10½ O'clock A. M. 5ct C'd.

J. H. Fisher, Clerk.

State of New York
County of Erie } ss.

I, JOHN H. MEAHL, Clerk of the County of Erie, and also Clerk of the Supreme and County Courts for said County, the same being Courts of Record do hereby certify that I have compared the annexed copy of Deed with the original Record thereof, entered and on file in the office of the Clerk of Erie County, and that the same is a correct transcript therefrom and of the whole of said original.

[Seal]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said County and Courts at Buffalo, this 16th day of June, 1916.

No. 1260

John H. Meahl,
Clerk.

[10c rev. stamp cancelled]

DEFENDANT'S EXHIBIT 8

THIS INDENTURE, made the sixth day of August, in the year of our Lord One Thousand Eight Hundred and Seventy-Four, between THE NIAGARA RIVER HYDRAULIC COMPANY, a corporation, existing by virtue of the laws of the State of New York, party of the first part, and THE INTERNATIONAL BRIDGE COMPANY, a corporation, existing by virtue of the laws of the State of New York and the Dominion of Canada, party of the second part,

WITNESSETH: That the said party of the first part, for and in consideration of the sum of Five Thousand Dollars in gold and silver coin, lawful money of the United States of America to it duly paid, has sold, and by these presents does sell, bargain, grant and convey to the said party of the second part, its successor or successors and assigns, ALL those certain pieces or parcels of land, situate, lying and being in the City of Buffalo, County of Erie and State of New York, being parts of Squaw Island in the Niagara River, the said pieces or parcels of land so sold and hereby intended to be conveyed (being two strips each sixty feet in width extending across said Island from low water mark in the Niagara River easterly to the Black Rock Harbor and are situated respectively on the north and south sides of the right of way, or lands originally purchased for and by the party of the second part, of and from the party of the first part, as described and conveyed in

and by a certain deed dated the 18th day of May in the year 1871, and recorded in the office of the Clerk of Erie County in liber 293 of deeds at page 395, June 6, 1871; said northerly parcel or strip commencing at the intersection of the northerly boundary of said right of way with the low water line of Niagara River, which said northerly boundary is distant 51 feet and 6 inches from the centre line of said International Bridge, and extending easterly along said northerly boundary on a tangent and curve and parallel to the centre line of the right of way so conveyed as aforesaid 1290 feet more or less, to Black Rock Harbor, and extending northerly so as to take in a strip of land of a uniform width of 60 feet, and containing One and 87|100 acres be the same more or less; and said southerly parcel or strip commencing at the intersection of the southerly boundary of said right of way with the low water line of Niagara River, with said southerly boundary is distant 68 feet and 6 inches from the centre line of said International Bridge, and extending easterly along said southerly boundary on a tangent and a curve, and parallel to the centre line of the right of way so conveyed as aforesaid, 1335 feet more or less, to Black Rock Harbor, and extending southerly so as to take in a strip of land of a uniform width of 60 feet, and containing one acre and 85-100 of an acre be the same more or less;

Together with all and singular the appurtenances and all of the estate, right, title and interest, property and possession of the said party of the first part.

It is mutually understood and agreed by and between the respective parties to this indenture, signified by its execution and acceptance, that the party of the first part and its successors and assigns, shall have the right, in common with the public at large, to use the bridge and railroad tracks erected and constructed, or to be erected and constructed and maintained by the party of the second part, upon the premises above described, and across the waters at either end of the main shores of the Niagara River, upon paying therefor the tolls and charges allowed by law; and further, that all reasonable and proper rail and other connections may be made with such bridge, and with the railroads to be laid thereon, by means of proper switches and appurtenances, as shall be required by the party of the first part, its successors or assigns, for the use and improvement of Squaw Island, or any part thereof, and ingress and egress required thereby, and for the business which may be transacted upon the same, and also that a suitable passage may be opened, constructed and maintained under said bridge, and the railroads upon or connected therewith, so as to connect the northerly and southerly parts of Squaw Island, the said passage to be made upon plans to be approved by the party of the second part, it being expressly understood, however, that such connections and passage shall be made at the sole cost of the party designing the same, and without expense to the party of the second part, its successors or assigns, and in such mode and manner as shall not interfere with the regular business

of said bridge, and without damage thereto or its appurtenances.

And the said party of the first part does hereby covenant, bargain and agree, that at the delivery hereof, it is the lawful owner of the premises above granted, and seized thereof by a good and indefeasible estate in fee simple, clear of encumbrances and that it will warrant and defend the above granted premises in the quiet and peaceable possession of the party of the second part, its successor or successors and assigns forever.

In Witness Whereof, the said party of the first part has hereunto on the day and year first above written, set its corporate seal in execution hereof, by virtue of a resolution of its Board of Directors, and caused the same to be attested by the signatures of its President and Secretary.

(Signed)

The Niagara River Hydraulic Company,

(L S) Samuel L. M. Barlow, President.

In the Presence of

Attest

William H. Taylor, Secretary.

State of New York
City & County of New York } ss.

On this twenty first day of August one thousand eight hundred and seventy four before me personally came William H. Taylor, Secretary of the Niagara River Hydraulic Company to me known

who being by me duly sworn did depose and say that he resided at Elizabeth in the State of New Jersey that he was the Secretary of the said Company that he knew the corporate seal of the said company that the seal affixed to the foregoing deed was such corporate seal that it was so affixed by order of the Board of Directors of said company and that he signed his name thereto by the like order as secretary of said Company. And the said William H. Taylor further said that he knew Samuel L. M. Barlow the President of the said Company and that the signature of the said Samuel L. M. Barlow subscribed to the said deed was in the genuine handwriting of the said Samuel L. M. Barlow and was thereto subscribed in the presence of him the said William H. Taylor by like order of the said board of Directors.

S. D. Thomas,
(L. S.) Notary Public Kings County.

State of New York }
County of Kings } ss.

I, George G. Herman Clerk of the County of Kings and Clerk of the Supreme Court of the State of New York in and for said county (said Court being a Court of Record) do hereby Certify that S. D. Thomas whose name is subscribed to the certificate of proof or acknowledgement of the annexed instrument and thereon written was at the time of taking such proof or acknowledgement a Notary Public of the state of New York in and for the said County of Kings dwelling in said County commissioned and sworn and duly

authorized to take the same and further that I am well acquainted with the handwriting of such Notary and verily believe the signature to said Certificate is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said County and Court this 21st day of August 1874.

(L. S.) George G. Herman Clerk

Recorded and Examined
August 27, 1874 at 4¼ o'clock P. M.

G. L. Remington
Clerk.

State of New York }
County of Erie } ss.

I, John H. Meahl, Clerk of the County of Erie, and also Clerk of the Supreme and County Courts for said County, the same being Courts of Record do hereby certify that I have compared the annexed copy of Deed with the original Record thereof, entered and on file in the office of the Clerk of Erie County, and that the same is a correct transcript therefrom and of the whole of said original.

[Seal]

In Witness Whereof, I have hereunto set my hand and affixed the seal of said County and Courts at Buffalo, this 16th day of June, 1916.

No. 1261 John H. Meahl,
Clerk.

[10c rev. stamp cancelled]

Brief of Defendant in Error

Supreme Court of the United States

No. [redacted]46

INTERNATIONAL BRIDGE COMPANY
Plaintiff in error

against

THE PEOPLE OF THE STATE OF NEW YORK
Defendants in error

CHARLES D. NEWTON
ATTORNEY GENERAL OF NEW YORK
FOR DEFENDANTS IN ERROR

OF COUNSEL:
RALPH A. KELLOGG
JAMES S. Y. IVINS
E. C. AIKEN

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TABLE OF CASES

SUPREME COURT OF THE UNITED STATES

INTERNATIONAL BRIDGE COMPANY,
Plaintiff in Error,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Defenaants in Error.

BRIEF FOR DEFENDANT IN ERROR

STATEMENT

Writ of Error to the Supreme Court of the State of New York to review a judgment entered in Albany County Clerk's Office on the 23rd day of March, 1918, on remittitur from the Court of Appeals, affirming the judgment of affirmance entered in Albany County Clerk's Office on August 2, 1917, on an order of the Appellate Division, Third Department, affirming with costs a judgment of the Supreme Court, entered in said Clerk's Office, November 20, 1916, in favor of plaintiff, The People of the State of New York, and against defendant International Bridge Company, for seven hundred forty-four and forty-two hundredths dollars ($774.42) (R. pp. 204–208 also 215–216). The judgment of the trial court was entered upon the decision of Mr.

Justice Rudd, a jury trial having been waived, (R. pp. 68, 69). No opinion was written by the trial court nor in the Appellate Division. The opinion of the Court of Appeals is printed at pages 197 to 202 of the record and is reported at 223 N. Y. 137. The decisions of both the Appellate Division and the Court of Appeals were unanimous.

The defendant in error sued to recover of the plaintiff in error the penalty of fifty dollars ($50.00) per day imposed by Chapter 666 of the Laws of 1915, for the failure of plaintiff in error up to January 11, 1916 to construct a roadway for vehicles and a pathway for pedestrians upon defendant's bridge across Black Rock Harbor from the mainland to Squaw Island, both in the City of Buffalo and State of New York, as required by that statute.

The plaintiff-in-error admits in its answer (record pp. 12-23) that it wholly failed, neglected and refused to comply with the provisions of this statute and that it is liable for the penalty for which the judgment appealed from was granted unless Chapter 666 of the Laws of 1916 contravenes the obligation of contract clause (Art. 1, § 10, Subd. 1), the deprivation of property clause (first section, 14th amend.), the foreign and interstate commerce clause (Art. 1, § 8, Subd. 3) of the United States Constitution, or the deprivation of property clause (Art. 1, § 6) of the Constitution of the State of New York, as it alleges.

While the action takes the form of one to recover penalties, the real issue is the right of the State to compel the plaintiff-in-error to build the roadway in question. The penalties continue

to accrue and already amount to about seventy thousand dollars ($70,000.00) to be recovered in a subsequent action. Obviously the plaintiff-in-error will build the roadway if legally subject to these penalties on failure to do so.

There are no exceptions to the admission or exclusion of evidence which plaintiff-in-error deemed of sufficient importance to bring to the attention of the courts below, or upon which any serious discussion, here, could be based.

While a vast amount of statutes, maps and other documentary evidence was introduced, there was practically no conflict of evidence or real dispute as to the essential facts upon which the issues of law depend. Of plaintiff-in-error's twenty-six requests to find facts (R. pp. 26–46), all were found by the trial court except five, i. e. Nos. VIII, XXII, XXIV, XXVI and XXVII and all with these exceptions and the last sentence of request No. XII, which is wholly immaterial, were incorporated in the decision (R. pp. 51–67) in the exact language requested. Of the twenty-four findings of fact in the decision, all except Nos. VIII, XXI, XXII, XXIII and XXIV are in the language of plaintiff-in-error's request to find. There was and is no possible question that each refusal to find facts was based upon either an absence of sufficient evidence to support it or ample evidence justifying a contrary conclusion or that each finding of fact not requested by defendent was based upon ample evidence to sustain it.

The Conclusions of Law (R. pp. 65–67) are, briefly stated, that the Statute in question, Chapter 666 of the Laws of 1915, is within the State's

police power and is a proper, reasonable, and valid exercise thereof and does not contravene any of the provisions above mentioned of the Federal or State Constitutions and that therefore the plaintiff is entitled to judgment for the penalties therein provided with costs.

Chapter 666 of the Laws of 1915 is here quoted in full for convenient reference:

> "*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*
>
> "Section 1. Chapter seven hundred and fifty-three of the laws of eighteen hundred and fifty-seven, entitled 'An act to incorporate the International Bridge Company,' is hereby amended by adding thereto a new section after section fifteen, to be known as section fifteen-a, and to read as follows:
>
> "§ 15-a. A roadway for vehicles and a pathway for pedestrians shall be constructed upon the draw across Black Rock Harbor giving a passageway over said draw between Squaw Island and the mainland of New York State, such roadway and footpath to be completed and ready for use by January first, nineteen hundred and sixteen, and in case of the failure of said corporation or its successor in interest so to complete the same on or before said date, said corporation or its successors in interest shall be liable to a penalty of fifty dollars per day for each day that it shall be in default. Such penalty may be sued for and collected by the attorney-general in any court of competent jurisdiction.
>
> "Upon the completion of said roadway and pathway, said company may erect toll gates and fix rates of toll for the use thereof, but no greater tolls than the following shall be charged for the use of the said roadway or

pathway; for every foot passenger, three cents for each passenger one way or five cents for round trip; for every horse and rider, five cents; for every carriage, except as hereinafter expressly provided, with horse or horses and occupants, ten cents; for every automobile, except as hereinafter expressly provided, and occupants, ten cents; for loaded wagons and loaded automobile trucks for commercial purposes, two cents for each ton of material carried, and no charge for empty wagons or automobile trucks used for commercial purposes, or for the drivers thereof.

"§ 2. This act shall take effect immediately."

THE FACTS AND CIRCUMSTANCES UNDER WHICH THE STATUTE OF 1915 *WAS ENACTED.*

I

BY THE STATUTE OF THIS STATE, CHAPTER 753 OF 1857, WHICH INCORPORATED IT, THE PLAINTIFF-IN-ERROR WAS GRANTED AND HAS EVER SINCE POSSESSED THE RIGHT AND FRANCHISE TO BUILD AND OPERATE A BRIDGE ACROSS THE NIAGARA RIVER FROM BUFFALO TO FORT ERIE, CANADA, "AS WELL FOR THE PASSAGE OF PERSONS ON FOOT AND IN CARRIAGES AND OTHERWISE AS FOR THE PASSAGE OF RAILROAD TRAINS."

Finding of Fact III, (R. pp. 53–54).
Chapter 753, Laws of 1857.

That the legislature contemplated the plaintiff-in-error would provide a pathway for pedestrians and a roadway for vehicles upon the bridge which

it was chartered and authorized to construct, if it built any at all, is very clearly expressed in the following words quoted from that act:

> "§ 15. Said bridge may be constructed as well for the passage of persons on foot and in carriages and otherwise as for the passage of railroad trains."
>
> "§ 16. Whenever the said bridge shall be complete for the passage of ordinary teams and carriages the said company may * * * fix rates of toll * * * but no greater toll than the following shall be charged, viz,: for every foot passenger * * * twenty-five cents; for every horse and single carriage sixty cents; for each double carriage and two horses, one dollar; for sheep * * * one and one-half cents per head; for swine two cents each; for neat cattle six cents per head; for each horse in droves or in cars, twelve and one-half cents."
>
> "§ 17. Whenever said bridge is so complete as to admit of the passage of railroad trains, the said company may make such rules in relation to * * * the compensation to be paid therefor, etc."
>
> "§ 18. If any person shall force * * * any gate or guard of said bridge * * * without having paid the established toll * * * such person shall forfeit, etc."

The extreme particularity with which rates of toll are provided for pedestrians, vehicles and animals down to a distinction between sheep and swine, is significant. The whole act breathes the idea that a bridge for railroad trains only was not in the mind of the legislature at all.

The fact that the word *may* instead of the word *must* is used in the first sentence quoted, has no

significance whatever. The whole act was necessarily permissive in form — the legislature obviously could not *require* the corporation to be formed, or the private citizens selected as a commission to organize it, to build any bridge at all. But if the franchise was accepted by building any bridge, then the word *may* was automatically changed to *must* as to each privilege conferred.

This was not a grant to an existing railroad corporation to build a bridge as a link in its line but the creation of a commission to organize an independent corporation to build this bridge, required by the public, as a separate and distinct undertaking. The fact that the Grand Trunk Railway subsequently acquired and now owns all the stock of the corporation so formed (folios 350-351; Exh. R. & R. I.) does not change the legal situation in the least, though the practical result is to destroy as far as the Grand Trunk Railroad can, the original object, purpose and character of appellant.

Finding of Fact (R. pp. 51-53).
Statute Chapter 753, Laws of 1857.

II

THE RIGHT, PRIVILEGE AND DUTY THUS CONFERRED AND IMPOSED TO BUILD A PATHWAY FOR PEDESTRIANS AND A ROADWAY FOR VEHICLES WAS CONTINUED UNIMPAIRED THROUGH ALL SUBSEQUENT LEGISLATION.

As suggested in the Act of 1857, the Canadian Government then enacted a similar statute (Chapter 227 of 20th Victoria), incorporating a com-

pany of the same name and purposes. This Act among other things, provided:

> "XIV. The said bridge *shall* be as well for the passage of persons on foot and in carriages and otherwise as for the passage of railroad trains."
>
> Findings of Fact IV and I (R. pp. 54; 51–52).

By Canadian and New York statutes, the two corporations were then consolidated as one. The New York statute (Chapter 550 of 1869) effecting this consolidation, provides:

> "Section 6. * * * the several corporations, parties thereto, shall be deemed and taken to be consolidated and to form one corporation * * * possessing all the rights, privileges and franchises, and subject to all the disabilities and duties of each of such corporations so consolidated."
>
> Finding No. II (folios 200–202).

The Congress of the United States by Chapter 176 of the Acts of 1870, confirmed the franchise so granted in these words:

> "That any bridge and its appurtenances which shall be constructed across the Niagara River from the City of Buffalo, N. Y., to Canada in pursuance of the provisions of an Act of the legislature of the State of New York, entitled 'An Act to incorporate the International Bridge Company,' passed April 17th 1857 (Chap. 753 above) or of any act or acts of said legislature now in force amending the same * * * are hereby authorized to be constructed and maintained as provided by said act and such amendments thereto."
>
> Finding V (R. pp. 54–55).

III

AT ALL TIMES SINCE ITS BRIDGE WAS FIRST PLANNED BY IT, ABOUT 1870, THE PLAINTIFF-IN-ERROR HAS POSSESSED AND ENJOYED THE FULL AND COMPLETE PERMISSION AND AUTHORITY OF THE FEDERAL GOVERNMENT TO CONSTRUCT THEREON A PATHWAY FOR PEDESTRIANS AND A ROADWAY FOR VEHICLES.

1. As already pointed out, Congress by Chapter 176 of the Act of 1870 in the passage above quoted therefrom, authorized the construction and maintenance by plaintiff-in-error of the bridge provided for in the original New York Act of 1857 and any amendments thereof then in force and that Act of 1857 and all amendments thereof authorize plaintiff-in-error to construct such bridge "*as well for the passage of persons on foot and in carriages and otherwise as for the passage of railroad trains.*"

We believe the original plans filed with and approved by the Secretary of War showed wings carrying a pathway and roadway for pedestrians and vehicles — and that seems to be confirmed by the finding that it was constructed as a railway bridge only and that the modification of the plans was subsequently approved.

Finding No. VI (R. pp. 55–56).

No specific finding to that effect appears in the record. But however that may be, it is obvious that the general authority to build such roadways as provided in the New York Act was granted by the Act of Congress of 1870 and getting plans

showing such pathways and roadways approved by the Secretary of War was a mere detail within the unquestioned rights of plaintiff-in-error, if it chose to exercise them.

2. Upon rebuilding the bridge in 1899–1901, the plaintiff-in-error filed and the Secretary of War duly approved, in pursuance of full authority from Congress, plans therefor which "*showed wings to be constructed on either side of the bridge for the accommodation of roadways and footpaths.*"

Finding X (R. pp. 57–58).

3. Upon being required by the Secretary of War in 1907 to remove the old and erect the present draw bridge across Black Rock Harbor from the mainland of Buffalo to Squaw Island — the very structure which is the subject of the Act, Chapter 666 of 1915 upon which this action was brought — the plaintiff-in-error filed and the Secretary of War with full authority approved plans therefor showing "*wings on each side of said proposed bridge for the purpose of accommodating roadways and footpaths.*"

Finding XIV (R. p. 61).
Defendant's Ex. 25.

IV

NO REVOCATION OF THE CONSENT, APPROVAL AND AUTHORITY OF THE FEDERAL GOVERNMENT IS FOUND OR SUGGESTED.

On the contrary, it is found that plaintiff-in-error in building the present draw across Black Rock Harbor was careful to design and construct it so that pathways and roadways could be hung thereon without interfering with the use of the structure for railroad purposes and to retain the right to make those additions at any time in the future by the following notation upon the plans so submitted and approved.

> "Roadways shown in dotted lines not to be put in at present but provision is made in the design of the bridge for their future construction."

Findings XIV and XV (R. pp. 61–62).

V

THE RIGHT TO ALTER, AMEND OR REPEAL WAS EXPRESSLY RESERVED TO THE STATE LEGISLATURE IN THE ORIGINAL ACT OF 1857 AND IN THE CONSOLIDATION ACT OF 1869.

Both of these Acts expressly provide that the following language of the Revised Statutes of 1829 and 1857 respectively shall apply to the plaintiff-in-error and these statutes creating it:

> "The Charter of every corporation which shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal in the discretion of the legislature."

VI

THE WATERS OF BLACK ROCK HARBOR, SPANNED BY PLAINTIFF-IN-ERROR'S DRAW BRIDGE, ARE WHOLLY WITHIN THE TERRITORIAL BOUNDARIES OF THE STATE OF NEW YORK.

Finding XX (R. p. 64).

VII

SQUAW ISLAND, WHICH PLAINTIFF-IN-ERROR'S DRAW BRIDGE ACROSS BLACK ROCK HARBOR CONNECTS WITH THE MAINLAND OF THE CITY OF BUFFALO AND STATE OF NEW YORK, IS WHOLLY WITHIN THE TERRITORIAL LIMITS OF SAID STATE.

Finding XXI (R. p. 64).

VIII

THE PLAINTIFF-IN-ERROR'S STRUCTURE CONSISTS OF THREE DISTINCT PARTS, VIZ: (a) THE DRAW BRIDGE ACROSS BLACK ROCK HARBOR FROM THE MAINLAND OF BUFFALO TO SQUAW ISLAND, (b) THE EMBANKMENT ACROSS SQUAW ISLAND, (c) THE BRIDGE ACROSS THE NIAGARA RIVER FROM SQUAW ISLAND TO CANADA.

Plaintiff-in-error's request VI. Found by the Trial Court (R. pp. 30–31).

While not of any great importance, and not deemed to require a specific finding, it appears without dispute from maps put in evidence by the plaintiff-in-error and from the testimony of its

chief engineer, that the respective lengths of these three sections of the structure, were:

(a) The draw bridge across Black Rock Harbor about 435 feet.

(b) The embankment across Squaw Island about 1,200 feet.

(c) The bridge across the Niagara River about 1,900 feet.

Stafford (R. p. 98).

IX

THE ABSOLUTE RIGHT TO CONNECT WITH AND USE PLAINTIFF-IN-ERROR'S BRIDGES AND EMBANKMENT AND THE RAILS AND ROADWAYS TO BE PLACED THEREON AND THE APPROACHES THERETO, FOR INTRA-STATE, AS WELL AS INTERSTATE TRAFFIC, TO AND FROM SQUAW ISLAND WAS EXPRESSLY SECURED TO THE OWNERS THEREOF FOR ALL TIME, BY THE DEED TO PLAINTIFF-IN-ERROR OF ITS RIGHT OF WAY ACROSS THE ISLAND, ON WHICH THE EXISTENCE OF THE BRIDGE DEPENDS.

This appears from the two deeds from Niagara River Hydraulic Company (the owner at those times) to the plaintiff-in-error dated respectively May 18, 1871, and August 6, 1874, put in evidence by the latter, each of which contains the following reservation and covenant in substantially the same language which is quoted from one of them:

> "It is mutually understood and agreed by and between the respective parties to this indenture, signified by its execution and acceptance, that the party of the first part and its successors and assigns shall have the right in common with the public at large to

use the bridge and railroad tracks erected and constructed or to be erected and constructed and maintained by the party of the second part upon the premises above described and across the waters at either end to the main shores of the Niagara River upon paying therefor the tolls and charges allowed by law and further that all reasonable and proper rail and other connections may be made with such bridge and with the railroads to be laid thereon by means of proper switches and appurtenances as shall be required by the party of the first part, its successors or assigns for the use and improvement of Squaw Island or any part thereof and ingress and egress required thereby and for the business which may be transacted upon the same."

Plaintiff-in-error's exhibits 7 and 8.
R. pp. 71-72.

While there is no specific finding on this point, it is one of the details which go to make up and justify:

Finding XXIV (R. p. 65).
Conclusions of Law, I, II, VI and VII (R. pp. 65-66).

It is a distinct and definite admission by the plaintiff-in-error contained in Exhibits voluntarily introduced by it to prove its own case — its lawful right to maintain its structure.

X

"THE PROBABLE COST OF CONSTRUCTING THE ROADWAY AND FOOTPATH REQUIRED BY CHAPTER 666 OF THE LAWS OF 1915 IS INSIGNIFICANT IN COMPARISON TO THE ASSETS AND ANNUAL NET EARNINGS OF THE PLAINTIFF-IN-ERROR."

Finding of Fact XXII (R. pp. 64–65).

In this specific and absolute language, the trial court covered conclusively much evidence.

By refusing to find appellant-in-error's Request XXVI (R. p. 42) the trial court settled finally so far as this court is concerned, that the cost of the construction would not be as much as forty-four thousand dollars ($44,000.00).

The only evidence offered by the plaintiff-in-error on this question, was to the effect that a sixteen foot roadway and a four foot pathway, *designed to carry two fifty ton trolley cars* would cost thirty-two thousand five hundred seventy-six and twelve hundredths dollars ($32,576.12) (folio 340).

The defendant-in-error did not contest that statement.

But it proved by competent evidence that a footpath four (4) feet wide and a roadway twelve (12) feet wide, properly designed to carry four eighteen (18) ton loaded automobile trucks at the same time, more than an ordinary highway bridge is built to carry, would have cost in the first two months after the act became effective, ten thousand four hundred fourteen dollars ($10,414.00)

and in the last six months of 1915, thirteen thousand seventeen dollars ($13,017.00) (R. pp. 162, 163, 168). *This evidence also stands wholly undisputed.* Indeed, the plaintiff-in-error's engineer who gave the figures as to the fifty-ton trolley car bridge, recalled to dispute the defendant-in-error's figures, declined to do so, saying merely: "Well, without having seen his exact calculations it appeared that the difference must be due to the fact that he did not figure on quite as heavy a maximum load as I did and that the bridge was to be not quite so wide" (R. p. 176).

The balance of plaintiff-in-error's forty-four thousand dollars ($44,000.00) estimate of cost which the court refused to find, was an item of thirteen thousand two hundred dollars ($13,200.00) which it claimed, but wholly failed to prove, was the value of all the indefinite amount of land it owned between Niagara street and Black Rock Harbor, a minute fraction of which would be used for the approach to the roadway benefiting and not subtracting from the value of the rest.

R. p. 87.
R. p. 93
R. p. 106.
R. pp. 113–115.
Map Exh. "A."

Refusing to find the appellant's cost figure, the trial court necessarily adopted the figure of thirteen thousand seventeen dollars ($13,017.00) maximum established by the defendant-in-error as the cost of a pathway and roadway fulfilling

all requirements of the Statute. No other conclusion was possible. *There is nothing in the Statute requiring the plaintiff-in-error to provide a roadway for fifty ton trolley cars.*

As to the other element in this finding — the annual income of plaintiff-in-error — that was to all intents and purposes stipulated by it.

> Exhibits "M," "N," "O," "P," "Q," "R" and "R1."
> R. pp. 178–179.

From these exhibits, which were statements of the plaintiff-in-error's earnings, examined and admitted by its counsel to be correct with certain changes, which he made, it appears that in year ending June 30, 1915, the last for which figures were obtainable, its net profits were three hundred forty-four thousand dollars ($344,000.00) on a capital stock of one million five hundred thousand dollars ($1,500,000.00), 22–98/100%, after deducting interest at seven per cent (7%) on eight hundred thousand dollars ($800,000.00) of bonds and all operating and maintenance expenses.

The other years covered by the exhibits showed similar earnings.

XI

"THERE IS NO EVIDENCE IN THE RECORD SHOWING THAT THE INVESTMENT REQUIRED BY CHAPTER 666 OF THE LAWS OF 1915 WOULD NOT YIELD A REASONABLE RETURN TO THE DEFENDANT."

Findings of Fact XXIII (R. p. 65).

The trial court also refused plaintiff-in-error's request to find that the annual interest and maintenance expense to defendant of the roadway and pathway required would be more than eight thousand dollars ($8,000.00).

Defendant's Request XXVII Refused (R. p. 42).

The plaintiff-in-error's claim as to annual cost which the court refused to find is based on an investment of forty-four thousand dollars ($44,000.00) (disallowed by the trial court as above pointed out) and exaggerated charges of all sorts including the absurd statement, characteristic of all the rest, that the wages of two men at sixty dollars ($60.00) per month each, amounts to two thousand eight hundred eighty dollars ($2,880.00) per annum (R. pp. 87–88).

It appeared that plaintiff-in-error in negotiations with defendant-in-error while the Act was pending had placed its annual expense, including interest on the investment, for a fifty ton trolley bridge twenty (20) feet wide at three thousand three hundred dollars ($3,300.00) per annum.

R. pp. 97, 146.

This court will find if it cares to go into the details that two thousand five hundred dollars

($2,500.00) per annum is ample allowance on the cost of such a roadway and pathway as the statute actually requires. For plaintiff-in-error's own figures made in business negotiations and not in creating evidence for a law suit covered a fifty ton trolley roadway and not merely the roadway required by the Statute.

As to what income could be reasonably expected *after* the roadway and pathway were constructed, the plaintiff-in-error offered no evidence whatever except numerous photographs showing that the Island, *without such facilities*, is vacant, exclusive of boat houses and small homes along its rim, while the mainland, four hundred feet away, is crowded with manufacturing plants which counsel had to explain were not upon the island as they appeared to be, because so near that they could not be kept out of the photographs.

Exhibit 31a (R. pp. 77–78, 98–99).

The defendant-in-error proved by uncontradicted evidence three great sources of revenue awaiting only the facilities in question, viz.:

(a) A going business having ample capital, producing in its first year from the Island, for sale and delivery in the city of Buffalo, by railroad and truck, one hundred thousand (100,000) tons of sand and gravel of high commercial quality, with inexhaustible supply of material and limitless market, and every prospect of continued increase in tonnage to four hundred fifty thousand (450,000) tons per annum within two or three years.

Defendant's Request XXIII Found by the Court (R. pp. 40–41).

(b) An existing use, of many years standing, by some hundreds of tenants of motorboat houses and homes on the Island and by thousands of their friends on occasions, notwithstanding there was no convenient or safe means of access. It appeared this use alone would increase many times with the facilities in question and should in itself support them.

R. pp. 125–128.

In this connection, the court's refusal to find as a fact the plaintiff-in-error's characterization of this use and source of revenue should be noted.

Defendant's Request XXII Refused by the Court (R. p. 40).

(c) The development of the property as a Lake, Rail and Barge Canal Terminal, with manufacturing sites, for which plans were already made by a public service corporation with ample backing awaiting only these facilities without which such a development was obviously impossible and with which the Island would become the most available and desirable site therefor.

Defendant's Request to Find XXV Found (R. p. 41).
Ricker (R. p. 120).
Kellogg (R. pp. 134–135; 137–138).
Exhibit "C."

It is determined as a final fact so far as this court is concerned, that the evidence fails to show that the *existing traffic offered in the present state of the Island* would not furnish plaintiff-in-

error a revenue of more than two thousand five hundred dollars ($2,500.00) per annum. The trial court so found by refusing to find the contrary as requested by the plaintiff-in-error:

> Defendant's Request XXIV Refused by the trial court (R. p. 41).

XII

BLACK ROCK HARBOR, IS AND WAS AT THE TIME THE ACT CHAPTER 666 OF 1915 WAS PASSED, A SHIP CANAL, DESIGNED TO CARRY THE LARGEST VESSELS ON THE GREAT LAKES, BUILT AND MAINTAINED BY THE FEDERAL GOVERNMENT FROM THE END OF LAKE ERIE AT THE SOURCE OF THE NIAGARA RIVER, ABOUT ONE MILE ABOVE OR SOUTH OF SQUAW ISLAND TO ITS LOWER OR NORTHERN END WITH A SHIP LOCK BACK INTO THE NIAGARA RIVER AT THE LATTER POINT.

The water in the canal is held at the level of Lake Erie (some four feet above the level of Niagara River at the lower end of Squaw Island), by a retaining wall along the eastern side of Squaw Island and extending south to Lake Erie. This ship canal was constructed by the Federal Government since 1899.

The Federal Government, however, did not build the retaining wall or first make Black Rock Harbor into an artificial canal or basin. That was done by the State of New York when it first built the Erie canal as a necessary and integral part of that century old public work. Until the Federal Government built its ship canal, Black

Development Corporation. That said Squaw Island Sand & Gravel Corporation in the year from June 1915 to June 1916 removed from said Island by boats 100,000 tons of gravel."

Plaintiff-in-error's Request XXIII Found by Trial Court (R. pp. 40–41).

"That plans were made for the development of Squaw Island in 1894 and the persons interested in the Squaw Island Development Corporation and the Squaw Island Sand & Gravel Corporation have organized several other corporations for the future development of Squaw Island including the Squaw Island Freight Terminal Co. Inc., and caused plans to be prepared in February 1913 for the projected development of Squaw Island as a land and water freight terminal, but no steps have been taken as yet to carry any of such plans into effect"

Plaintiff-in-error's Request XXV Found (R. p. 41).

"That Squaw Island in said river is wholly within the territorial boundaries of the United States and of the State of New York."

Finding XXI (R. p. 40).

The outlines of the picture sketched by these findings of subsidiary facts, filled in with the facts of common geography and knowledge of which this court will take judicial notice, are impressive and sufficient in themselves.

Here is a tract of one hundred twenty-four (124) acres of deep water harbor land separated

from the mainland of one of the greatest and most congested ports of the world by a ship canal some four hundred (400) feet wide which it borders for a mile. It is crossed by a railroad connecting it with trunk line railroads east and west. The barge canal ending at Tonawanda four miles below, must send its boats to Buffalo terminals through the ship canal past Squaw Islands mile of frontage thereon.

A corporation, organized for the purpose under the New York Transportation Corporations Act, Art. 10a, declaring it to be a public service corporation subject to the control of the State's Public Service Commission, with the power of eminent domain — essentially of the same general character as the plaintiff-in-error or any railroad — has been formed to develop on this highly desirable and available tract of large dimensions with every needed facility *except roadway connection with the mainland*, an independent Lake, Rail and Barge Canal Terminal with manufacturing sites for enterprises requiring those facilities. It has had complete plans made for that development. But until this roadway connection is provided, the undertaking of great public interest and value, is obviously stalled and held up. It has an absolute contract under which it can compel the plaintiff-in-error to permit it to connect with and use the railroad upon plaintiff-in-error's bridge on paying the same nominal tolls ($1.00) for loaded and 50 cents for empty cars) that other railroads pay (covenant in deed of plaintiff-in-error's right of way quoted above). It has the same right under that cove-

nant to us the roadway upon plaintiff-in-error's bridge. *But the roadway has never been built and that is the only conceivable reason why this great tract of superb harbor land with every other facility and advantage remains undeveloped for the public use by the company chartered by the State for that purpose with its plans all made.*

An examination of the comprehensive testimony of competent witnesses wholly uncontradicted and of the maps and plans in evidence merely fill out the picture in complete and vivid detail. For instance, it appears that the plan provides nine thousand (9,000) feet of dockage, suitable for the largest lake vessels; that the plaintiff-in-error's bridge connects the Island with the New York Central, Erie, and Delaware, Lackawanna & Western belt lines at its eastern end and with the Grand Trunk, Pere Marquette, Wabash, and Michigan Central at its western end, and through these with all other trunk lines entering Buffalo; that immediately across the 435 feet of drawbridge is Niagara street, one of the main streets of Buffalo with double track trolley line; that no other land on the ship canal is available for this purpose and that Squaw Island is the only tract of harbor land in the port of Buffalo obtainable for this purpose; and that all things considered, it is the best site for such an independent terminal in the port of Buffalo; that the present owners gave back a purchase money mortgage of five hundred thousand dollars ($500,000.00) when Squaw Island was recently bought.

Ricker (R. pp. 108–110; 116–120).
Exhibits " B " and " C."

Then there is the existing business, of " removing from said island " sand, grit and gravel which amounted to 100,000 tons in the first year. This laconic finding reasonably implies that such removal was made for sales and delivery in the adjoining market afforded by the city of Buffalo as such material obviously cannot be transported profitably any great distance from its source. This necessarily means that the material after being " removed by boats " has to be landed at a mainland dock and loaded thence into cars and truck for delivery. Whereas, with the roadway in question and rail connection it would be loaded direct into cars and trucks on the Island without the intervention of boats or mainland docks which latter represent an extra cost to the consumer for material which is now a necessity in building operations.

On this point the uncontradicted evidence if examined would be found to add many important details such as:

Squaw Island is composed to a depth of more than forty feet of the highest grade concrete material in an almost scientifically perfect aggregate of hard and clean sand, grit and gravel in correct proportions, containing approximately 6,000,000 yards of that material with annual accretions of about 100,000 yards. A yard weighs a ton and a half. The market for this material is practically unlimited at a profitable price. The first year's business should grow to 450,000 tons in two or three years.

Ricker (R. pp. 110–121).
Kellogg (R. pp. 138–139).

And finally there is the public necessity of providing a safe and convenient access to a large tract in the heart of the city for many hundreds of citizens who have for many years used this property for motor boat houses and other recreation purposes and even for homes, as tenants of the owners. This fact appears in the Findings only in the court's refusal to adopt the plaintiff-in-error's attempt to belittle that use.

Request to Find Refused (R. p. 40).

The evidence on this detail also is complete and conclusive.

Taylor (R. pp. 172–173).
Lytle (R. pp. 125–130).
Kellogg (R. pp. 149–152).

It is perfectly obvious that access to this large and valuable portion of the City must be provided either by building a new bridge across Black Rock Harbor or by compelling the plaintiff-in-error immediately to exercise its franchise dormant for half a century. There is no doubt whatever that the City or State could build such a bridge with the public funds — it would clearly be a public use. But another bridge across the ship canal just above the lock would be a serious interference with navigation not to be permitted so long as the plaintiff-in-error's bridge can serve the purpose satisfactorily without such added obstruction or any interference with its present use for railway purposes.

On what possible theory could the trial court have reached any other conclusion than that crystallized in his finding XXXIV?

XIV

"THAT THE DEFENDANT HAS FAILED AND NEGLECTED TO CONSTRUCT OR PLACE UPON THE BLACK ROCK HARBOR DRAW OF ITS SAID BRIDGE A ROADWAY FOR VEHICLES OR A PATHWAY FOR PEDESTRIANS AS REQUIRED BY SAID CHAPTER 666 OF THE LAWS OF 1915, AND HAS TAKEN NO STEPS TOWARDS THE CONSTRUCTION OF SUCH ROADWAY AND PATHWAY."

Finding XVII (R. pp. 62-63).

ANALYSES OF PLAINTIFF-IN-ERROR'S LEGAL CONTENTIONS

I

The findings of fact by the trial court and its refusals to find facts requested by the plaintiff-in-error being clearly justified by the evidence and unanimously affirmed by the Appellate Division and the Court of Appeals, it would seem that several of the plaintiff-in-error's principal contentions in the courts below were now eliminated as issues in this case.

In this class of legal issues so eliminated are plaintiff-in-error's contentions that the prospective revenue from the required roadway arm would not be a fair return upon the investment, and that no public purpose would be subserved thereby, and with those issues any possible contention that there is any taking without compensation of tangible property goes out of the case.

II

The minor claim, thrown in merely as a make-weight, that the Act of 1915 is unconstitutional in that the section as to tolls permits the use of the roadway by empty commercial vehicles without paying anything for that privilege, requires little consideration. The facts that a large tonnage toll is imposed upon the loads carried by such vehicles and that going to the Island implies coming back loaded as they cannot go anywhere else — that an ample round trip toll is in effect provided — may not make any impression on plaintiff-in-error's distorted conception, but can hardly fail to answer the objection, in the judgment of the court. Since, as plaintiff-in-error concedes and must concede, the Act is severable and may stand notwithstanding this minute theoretical omission, if it is one, we do not see how the contention, if sound, could affect this appeal.

III

Plaintiff-in-error's remaining legal contentions, open to discussion before this court, may be fairly summarized as follows:

It admits and claims that it has possessed for a number of years complete franchise, authority and right from both the State and Federal Government to build the roadway arm in question — that it requires no additional authorization from any government; that building such a roadway arm upon its Black Rock Harbor draw, expressly

designed and constructed for that purpose, would not require any reconstruction thereof or interfere in any way with its present use for railroad trains; that no positive franchise is taken away or abridged by requiring it to construct that roadway; that this roadway will be wholly within the State of New York and limited entirely to intra-state traffic and is therefore wholly outside the jurisdiction of the Federal Government so far as compelling its construction is concerned. And yet it insists that the State of New York, the only authority which could possibly compel it to exercise the franchise which it possesses, is powerless to do so for these reasons:

(a) Because it has acquired also a peculiar and unique franchise, right and privilege, to wit:

The *negative* right, privilege and franchise not to build the pathway and roadway — not to exercise its *positive* franchise — until it sees fit do so.

It contends that the Act of 1915 is unconstitutional, not because it takes away or abridges any positive or express right of franchise (which it concedes is not the case) but because it takes away or abridges this novel conception, the alleged negative and implied franchise not to exercise the positive franchise while continuing to possess that positive franchise inviolate.

It admits the right reserved to alter, amend or repeal its original charter but insists the Legislature cannot exercise it solely becausq of this negative franchise which counsel have created for it out of the stuff that dreams are made of.

To create and make permanent its newfangled implied franchise to be above all law, is the only conceivable object justifying its resistance to this

law. Only the dim possibility of acquiring such an extraordinary asset, justified risking the penalties imposed by the Act of 1915 (already several times greater than the entire cost of the roadway).

(b) Because the Federal Government though it has given its complete assent and approval, might have refused such consent if it had wished to, under its powers over navigable waters.

(c) Because it might theoretically reduce the rate per cent of net earnings from the present .22933 on the capital of $1,500,000 derived from interstate commerce, to .227657 on the old capital plus the new investment of say $15,000. For the trial court found merely that the roadway investment would yield a " reasonable return " which of course means 6 per cent or nine hundred dollars ($900). Dividing three hundred forty-four thousand nine hundred dollars ($344,900) by one million five hundred fifteen thousand dollars ($1,515,000) gives the decimal last stated. This reduction is approximately one-sixth (1/6) of one per cent (1%).

It may be difficult to see how this reduction in the average net return to the appellant which still remains nearly four times what the courts call a " reasonable return " can be a burden upon interstate commerce.

(d) Because in a deed of *property,* expressly restricted to use for navigation purposes only, the State Land Board has by implication abandoned *in toto* the sovereignty of the State over Black Rock Harbor and incidentally over the plaintiff-in-error. It is true that this conveyance was subject to all rights and duties previously

acquired by and imposed upon the plaintiff-in-error including the right and obligation to build a roadway arm upon its bridge; that the Federal Government subsequently granted specifically the right to build the particular roadway arm in question on the Black Rock Harbor drawbridge; that the Federal Government could not acquire or exercise the sovereignty so abandoned in so far as compelling this roadway arm for intrastate traffic only is concerned; that Squaw Island still remains a part of the State and the city of Buffalo though separated therefrom by an independent kingdom; that plaintiff-in-error still remains a creature of the State subject to its laws in all other respects including taxation; that the effect of the transaction as seen by the plaintiff-in-error is to transfer to it or rather to its owner the Grand Trunk Railroad of Canada and London, the sovereignty so abandoned by the State and not acquired by the Federal Government. But the strange result must not be weighed against the theoretical fact logically inevitable. The plaintiff-in-error being unique in that it is the creature of three governments, each limited in jurisdiction, it is not surprising that in some respects it has no sovereign at all — except of course the Grand Trunk railroad.

(e) Because the ultimate termini of plaintiff-in-error's structure being on the mainland of Canada and on the mainland of New York it must be treated as though the intervening Squaw Island did not exist.

It is true that to save building twelve hundred (1200) feet of expensive bridge it acquired at the

outset, a right of way across Squaw Island on which one-third of its structure rests, and that the consideration for that grant was a solemn covenant by it that the owners of Squaw Island should forever have the right to connect with and use appellant's rails and roadway.

At first blush it would seem that the plaintiff-in-error by this transaction became obligated to include service to Squaw Island as part of its legal duty. There is nothing in its charters expressly or impliedly forbidding that service which would merely add to its usefulness as an instrument of commerce. If there was any question as to its having a franchise to do so Chapter 666 of the Laws of 1915 removes that doubt. The liability necessarily existed from the moment the deed was accepted. There never was a time when the exercise of its franchise was not " burdened " with that obligation since its structure was first planned and built.

But being primarily an instrument of interstate and foreign commerce, it is beyond the reach of any sovereignty or court which seeks to enforce that obligation.

The conveyance to it of its right of way is inviolate but its covenant given as consideration therefor, is a " scrap of paper." The owners of Squaw Island should have known this as no one can plead ignorance of the law. The Grand Trunk Railroad, also an instrument of foreign commerce, in buying all of its bonds and stock, had a right to rely upon the fact that it owned the right of way but the covenant to pay for it was illegal and void. Under those conditions any attempt to enforce or take action upon the covenant

is a taking of property without compensation. It makes no difference that on this theory the property was originally acquired by theft.

The foregoing is not irreverent sarcasm as it may seem to be, but an honest effort to express the essence of the position which the plaintiff-in-error has taken for half a century in opposition to the continuous demand on both sides of the Niagara River that it be compelled to exercise the franchise (in its nature exclusive) which it has possessed all those years, and the position which it takes as to this final effort of the State of New York to appease the righteous wrath of the public, at least as far as lands within its own boundaries are concerned, and as to the portion of plaintiff-in-error's structures where such a roadway can be hung without rebuilding the structure or interfering with railroad traffic.

THE DEFENDANT-IN-ERROR'S POSITION IS:

I

That the plaintiff-in-error was never granted and does not possess any special, negative franchise, express or implied, by virtue of which it is freed from the general obligation imposed upon all public service corporations to exercise positive franchises for the public benefit and therefore the Act of 1915 *does not take away or abridge any franchise which it possesses.*

II

That Chapter 666 of the Laws of 1915 merely set a limit to further delay in performing a duty imposed half a century before by the grant and acceptance of its Charter and made it possible to enforce that duty by providing a penalty for any further delay.

III

That even if the plaintiff-in-error had not been chartered expressly to build a bridge for pedestrians and vehicles as well as for railroad cars, the State had, under its police power and the right reserved to alter, amend and repeal, power to add the requirement of a pathway and roadway on the section of the bridge within its territorial limits where, as here,

(a) The structure was planned therefor and such pathway and roadway could be hung thereon without rebuilding any part of the structure or in any wise interfering with its present use for railroad trains.

(b) The Federal Government had exercised its powers to prevent obstruction to navigable streams by formally authorizing and approving such footpath and roadway.

(c) " The probable cost of constructing the roadway, and footpath required by Chapter 666 of the Laws of 1915, is insignificant in comparison to the assets and net earnings of the defendant."

(Finding XXII, R. pp. 64–65.)

(d) " The construction of the roadway and footpath required by Chapter 666 of the Laws of 1915, was and is necessary for the public interest and for the public convenience."

(Finding XXIV, R. p. 65.)

(e) " There is no evidence in the record showing that the investment required by Chapter 666 of the Laws of 1915 would not yield a reasonable return to the defendant."

(Finding XXIII, R. p. 65.)

(f) The land within the State, which this portion of the bridge connects, over waters of the State, with the main lands of the State, is a large tract immensely valuable for deep water harbor purposes and has the absolute right by express covenant of plaintiff-in-error, given in payment for its right of way across that land, to connect with and use the rails and roadways upon such bridge not only for the ultimate occupants thereof but for the " improvement " of that land.

IV

That the Federal Government, having, at plaintiff-in-error's request, approved the original charter authorizing a footpath and roadway and having expressly authorized it to construct the bridge as in said charter provided, and having further specifically approved and authorized the pathway and roadway upon the Black Rock Harbor span, directed by the Act of 1915, *prior to that enactment, the fact that the Federal Government might have objected but did not, is certainly not an issue in this case.*

LAW

POINT FIRST

CHAPTER 666 OF THE LAWS OF 1915 DOES NOT IMPAIR THE OBLIGATION OF CONTRACTS, ITS SOLE PURPOSE AND EFFECT BEING TO ENFORCE THE ONLY CONTRACTS INVOLVED.

I

Before engaging in the endless discussion of the principle announced by Chief Justice Marshall and the antidote suggested by Justice Story, in the Dartmouth College Case (4 Wheat 518), it is wise to consider whether the volumes of learned writings on these subjects have any possible application to the case in hand.

Assuming that a charter is a contract even where it contains in itself, as here, Mr. Justice Story's self-destroying germ — the reserved right to alter, amend or repeal — what was the contract so created between the plaintiff-in-error and the State of New York and how is it "impaired"?

In addition to its corporate powers (which are not affected by the Act of 1915) the plaintiff-in-error unquestionably acquired through the original New York and Canadian Acts incorporating it, the New York Act consolidating the two corporations, so formed and the United States statute authorizing the construction of the bridge in accordance with the provision of the original New York Act of 1857, a full, complete and absolute franchise to build a bridge "*for persons on foot and in carriages and otherwise*" and for railroad trains.

The New York Statute of 1857 (Chap. 753) provided:

> " § 15. Said bridge *may* be constructed as well for the passage of persons on foot and in carriages and otherwise as for the passage of railroad trains."

The Canadian Statute (227 of 20th Victoria), provided:

> " Said bridge *shall* be constructed as well for the passage of persons on foot and in carriages and otherwise as for the passage of railroad trains."

The New York Consolidating Act (Chap. 550, Laws of 1869) provided that the Canadian and New York corporations consolidated thereby should have all the powers and franchises and be subject to all the duties of the corporations so consolidated.

The Act of Congress of June 30, 1870, Chapter 176, approved and authorized and declared to be a lawful structure any bridge constructed " in pursuance of the provisions of " the New York Act of 1857 and amendments thereto.

Assuming that plaintiff-in-error's franchise so granted to construct a bridge " both for persons on foot and in carriages and otherwise and for railroad trains " was a contract with the State of New York which the latter could not " impair," though it had expresly reserved the right to alter, amend or repeal, *in what respect does Chapter 666 of 1915 " impair " that contract?*

If the State of New York had attempted by the Act of 1915 to take away from plaintiff-in-error either its franchise to construct and operate a

bridge for railroad trains or its franchise to construct and operate a bridge for pedestrians and vehicles, we can understand that the question of impairment of contract might arise.

Or if the required exercise of the franchise to build a roadway and pathway interfered with the enjoyment of the franchise to operate railroad trains or required the rebuilding of an existing structure with consequent interruption of railroad traffic, complaint might be justified though "impairment" could hardly be predicated.

But how an Act which instead of taking away or interfering with either franchise, merely compels plaintiff-in-error to exercise both instead of only one "impairs" either, is beyond our comprehension.

Confronted with the obvious necessity of having something "impaired" before his impairment of contract authorities can be used, counsel invents an additional and entirely new and original franchise, which he says this particular statute of 1857 conferred upon the appellant, to wit: an implied negative franchise not to exercise, until it sees fit, the positive franchises so granted.

The chief difficulty in destroying this fantastic conception lies in grasping a thing so subtle and volatile and holding it long enough to permit of analysis.

The plaintiff-in-error does not suggest that there is any peculiarity in the language used in the original grant of these franchises on which such a claim can be based. The object being to create a commission to form a corporation, the language was necessarily permissive. It could not *require* either the commission or the corpora-

tion as yet unborn to build a bridge either for railroads or for pedestrians and vehicles or any bridge at all. But the plaintiff-in-error suggests the legislature *might* have said " if any bridge is built for pedestrians and vehicles it *shall* be built for railroads also and if any bridge is built for railroads it *shall* be built for pedestrians and vehicles also." Failure to employ that unnecessary and unusual language implies, it insists, an unnecessary and unusual conclusion, viz: that this public service corporation should possess a unique and special franchise not given to other corporations of its class — the *negative* franchise to possess and not be required to use the *positive* franchise so granted.

That is the sum total of its position on this branch of the case. This negative franchise to possess and not use, so implied, is the only alleged contract upon which it depends to bring this case within the obligation of contracts clause of the Federal Constitution.

A sufficient answer would seem to be (using plaintiff-in-error's own method of producing a positive by the multiplication of negatives), to point out that if the legislature intended to grant this special negative franchise, it could have said so and not having said so, it did not so intend.

Having made that preposterous claim the plaintiff-in-error is confronted, at the threshold of its long review of authorities on the obligation of contracts clause, by the unfortunate fact that the Canadian Act in the section above quoted does use practically the language the plaintiff-in-error suggests, and the further fact that any duty imposed by the Canadian Act was adopted into the

New York Statute by the New York Consolidation Act of 1869 as above mentioned and hence the word *shall* in the Canadian Act was automatically substituted for the word *may* in the original New York Statute of 1857.

To dispose of that grave difficulty, the plaintiff-in-error then attempts to show that the word *shall* in the Canadian Act was a thoughtless error and use practically the language the plaintiff-in-error must be read as though spelt *may*. It seems unnecessary to follow the elaborate argument or to go into the long opinion of a Canadian Court which has been printed at the end of the record and on which that subtle argument is based. The trial court refused to find that the Canadian Court had so decided or had decided anything at all except that it had no jurisdiction of the subject matter of the action and that the bridge as constructed did not constitute a nuisance and that determination is amply justified by a casual reading of the opinion.

Request VIII., R. pp. 31–32.
Finding VIII., R. pp. 56–57.

The actual view taken by the Canadian Court is expressed by it in the following language:

> " to hold that such a structure • • • could be abated as a nuisance because the company has omitted or refused to complete some portion of the structure intended for the use of carriages and foot passengers, and not in the slightest degree affecting the navigation of the river, would be a reflection on the administration of justice. The fallacy consists in calling the abandonment of a por-

tion of the work a public nuisance, instead of, what it probably is, an abuse of the Act of Parliament."

(R. p. 183–184.)

II

There is something cynically humorous in the effort to mislead the court in this respect.

Instead of *impairing* any contract the sole purpose and effect of the statute, Chapter 666 of 1915, obviously is to compel the plaintiff-in-error to perform, after a half century of neglect and failure, the only contracts involved:

(a) Its contract with the State implied from its acceptance of its charter and franchises, to provide a pathway for pedestrians and a roadway for vehicles on its bridge.

(b) Its express contract with the owners of Squaw Island to provide those facilities, made as the consideration for the grant of the land on which one-third of its entire structure rests.

The unavoidable complement of the rule that a charter and grant of franchises constitutes a contract on the part of the State is that the acceptance thereof by the corporation constitutes a contract on the part of the corporation as well — else there could be no contract at all.

This proposition is fully recognized and established by the court which held that charters are contracts, in many decisions of which these are recent examples:

In *Atlantic Coast Line* v. *N. Car. Corp. Com.* (206 U. S. 1), the court said at page 27:

> "As the duty to furnish necessary facilities is co-terminous with the powers of the corpo-

> ration, the obligation to discharge that duty must be considered in connection with the nature ad productiveness of the corporate business as a whole, the character of the service required and the public need for its performance."

In *Mo. Pac.* v. *Kansas* (216 U. S. 262) the same principle was enunciated at page 277–278:

> " The first and pivotal question arising is whether the order complained of did anything more than command the railroad company to perform a service which was incumbent upon it to perform as the necessary result of the possession and enjoyment of its charter powers and which it could not refuse to perform so long as the charter powers remained and the obligation which arose from their enjoyment continued to exist."

And in *Ches. & Ohio Ry.* v. *Public Service Com.*, (242 U. S. 603), the court expressed the same doctrine in the following language at page 607:

> " One of the duties of a railroad doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the State and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them and its performance cannot be avoided merely because it will be attended by some pecuniary loss."

In each of these cases a State had required an interstate railroad to run special passenger trains on branch lines within the State, and the require-

ment was sustained by the Supreme Court on the principle enunciated in the above quotations, although in each case it was clearly proved that the service required could not be furnished except at a great loss.

As to the contract with the owners of Squaw Island, it is an express and definite covenant contained in the deeds by which plaintiff-in-error acquired the strip across the Island 200 feet wide by 1200 feet long on which it built the embankment connecting its two bridges thereby saving the immense expense of an additional 1200 feet of piers and steel structure. The language of this covenant is quoted under point IX of the Statement of Facts.

In addition to the right and duty of the State to see that its creature should not any longer refuse to pay the agreed and reasonable price for the valuable right it so acquired and continues to enjoy, it is a fact, as found by the trial court, that enforcement of that contract was necessary for the public interest and convenience in making a large and patently valuable deep harbor section of the city of Buffalo available for development and use by the public in general.

Finding XXIV., p. 65.

III

To meet the dim possibility that the court can succeed where we have failed, in discovering in plaintiff-in-error's charter any contract which might possibly be " impaired " by the Act of 1915 we respectfully refer the court to the following selection from the innumerable decisions called

forth by Chief Justice Marshall's doctrine that a charter is a contract, where Justice Story's suggestion that the right to alter, amend and repeal might be reserved has been followed, as it was in the charter granted the plaintiff-in-error.

Jefferson College v. *Washington College*, 13 Wall. 190.
Miller v. *New York*, 15 Wall. 478.
Hamilton Gas Light & Coke Co. v. *Hamilton*, 146 U. S. 258.
Sioux City S. R. Co. v. *Sioux City*, 138 U. S. 98.
Holyoke Water Co. v. *Lyman*, 15 Wall. 500.
Louisville Water Co. v. *Clark*, 143 U. S. 1.
Erie Railroad Co. v. *Williams*, 233 U. S. at p. 700.
Ramapo Water Co. v. *City of New York*, 236 U. S. 579.
Calder v. *Michigan*, 218 U. S. 591.
N. Y. & N. E. Railroad Co. v. *Bristol*, 151 U. S. 556.
Fair Haven & W. R. Co. v. *New Haven*, 203 U. S. 379.
Noble State Bank v. *Haskell*, 219 U. S. 104.

In none of the foregoing cases (nor in any other we have been able to find) is there any support for plaintiff-in-error's negative franchise to possess a positive franchise and not use it, nor any suggestion that compelling a corporation to perform its side of the contract is an impairment of contractual rights.

In all of these cases, important changes in charters were made under the reserved right to alter, amend and repeal and in most of them serious new burdens were imposed.

As said in one of the most recent cases cited *Erie Railroad Company* v. *Williams:*

> " It may be admitted an advantage is taken away from plaintiff, or to put it another way, a burden is imposed upon it. Is it within the power of a State to impose the burden by virtue of its reserved control over plaintiff? The question must be answered as if the requirement of the law was part of the original charter * * * and it would seem necessarily to be the very essence of the right of amendment reserved that what could have been put in the charter originally, whatever its consequences, can be added to the charter whatever its consequences."

All the authorities which are cited and discussed below on the question of taking property without compensation, might be added to the foregoing. For, with the right reserved to alter, amend or repeal, all that is left of the obligation of contract clause, if anything, is covered by the 14th Amendment and the similar provision of the State Constitution. To " impair " under those conditions there must be a taking of what has become vested property.

POINT SECOND

THE STATUTE IS A PROPER AND REASONABLE EXERCISE OF THE STATE'S POLICE POWER AND THEREFORE DOES NOT CONTRAVENE THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION.

I

The idea is not uncommon that a State's "police power" because of its unfortunate name is limited to the preservation of the public health, safety and morals.

Nothing could be further from the fact. It extends to all matters affecting the public convenience and general welfare including commercial prosperity; and the definition of what is a public use in aid of which it may be exercised, is precisely as comprehensive as the definition of a public use for which the right to exercise the right of eminent domain may be granted.

Noble State Bank v. *Haskell*, 219 U. S. 104.

Clark v. *Nash*, 198 U. S. 361.

Strickley v. *Highland Boy Mining Co.*, 200 U. S. 527.

Offield v. *N. Y. N. H. & H. R. R. Co.*, 203 U. S. 372.

Bacon v. *Walker*, 204 U. S. 311.

C. B. & Q. R. R. v. *Drainage Com.*, 200 U. S. 561.

Mo. Pac. R. Co. v. *City of Omaha*, 235 U. S. 121.

Erie R. R. Co. v. *Williams*, 233 U. S. p. 700.

N. Y. & N. E. R. Co. v. *Bristol*, 151 U. S. 556.
Wisconsin, etc., R. Co. v. *Jacobson*, 179 U. S. 287.
Balt. & Ohio R. Co. v. *I. C. C.*, 221 U. S. 612.
C. M. & St. P. R. R. Co. v. *Minneapolis*, 232 U. S. 430.
Close v. *Glenwood Cemetery*, 107 U. S. 466.
Shields v. *Ohio*, 95 U. S. 319.
Atlantic Coast Line v. *Georgia*, 234 U. S. 280.
Munn v. *Illinois*, 94 U. S. 113.
Ches. & Ohio Ry. v. *Public Service Com.*, 242 U. S. 603.
Lake Shore & M. S. Ry. Co. v. *Clough*, 242 U. S. 375.
Atlantic Coast Line v. *N. Car. Corp. Com.*, 206 U. S. 1.
Cummings v. *Chicago*, 188 U. S. 410.
C. A. T. Co. v. *Chicago*, 210 Fed. 7.
Minnesota Rate Cases, 230 U. S. 352.
West Chicago S. R. Co. v. *Illinois*, 201 U. S. 506.
Mo. Pac. Ry. Co. v. *Kansas*, 216 U. S. 262.
Mt. Vernon C. Co. v. *A. P. Co.*, 240 U. S. 30.

The foregoing decisions are a minute fraction of all those in the United States Supreme Court alone which might be referred to in support of this proposition. Each has been selected after careful examination because it has a definite bear-

ing upon this particuilar question, and all, with the innumerable others, are of one voice.

The *Minnesota Rate Cases* merely reiterate a principle established in the earliest days of the court that the regulation of the rates charged by public carriers or any other corporation of the class known as public service corporations, is within the "police power" of a state. As Mr. Justice Hughes says (p. 413):

> "The power of the State to limit by legislation the charges of common carriers within its borders was not confined to the power to impose limitations in connection with grants of corporate privileges. In view of the nature of their business, they were held subject to legislative control as to the amount of their charges * * *."

In *Mo. Pac. Ry. Co.* v. *Kansas, supra,* it was held that it was a proper exercise of a state's "police power" to compel a railroad, incorporated elsewhere, to run a passenger train as distinguished from a freight train with passenger car attached, between two points within the state though the railroad proved beyond question that all its business within that state was done at a loss and the running of such a passenger train would not pay operating cost.

In *Noble State Bank* v. *Haskell, supra,* it was held that a statute requiring all banks in the state (except National) to join in guaranteeing the deposits in each other, was a proper exercise of the police power, the court saying:

> "There is no denying that by this law a portion of its property might be taken without return to pay the debts of a failing rival

> in business. * * * It may be said in a general way that the police power extends to all great public needs.
> * * * * * * *
>
> "Among matters of that sort probably few would doubt that both usage and preponderant opinion give sanction to enforcing the primary condition of successful business. * * * If then the legislature of the State thinks that the public welfare requires it, the measure under consideration, analogy and principle are in favor of the power to enact it."

To sustain its view the court turned to cases in which the exercise of the power of eminent domain had been sustained, on the obviously sound theory that whatever was a public use for which the right of eminent domain could be exercised, was a public use for which a State might exercise its police power and cited with approval among others, the next two decisions referred to herein.

Clark v. *Nash, supra,* is a case in which the condemnation of private property for an irrigation ditch to serve one ranch owned by a private citizen, was sustained.

Strickley v. *Highland Boy Mining Co., supra,* is a recent case in which the Supreme Court held constitutional a statute of Utah authorizing the condemnation of rights of way for tramways to mines, and condemnation thereunder of a right of way for an aerial tramway to one private mine was sustained.

In *C. B. & Q. R. R.* v. *Drainage Commission, supra,* also a recent case, the Supreme Court held constitutional as a proper exercise of the police power an order of the Illinois Drainage Commis-

sion requiring a railroad to remove and rebuild at large expense, its bridge across an unnavigable creek for the sole reason that the Commission desired to benefit a few private owners of a small section of land by improving its fertility, no question whatever of public health being involved as the court took care to point out, saying as to that:

> "We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. * * * If the injury complained of is only the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation on account of such injury does not exist."

In *Mo. Pac. R. Co.* v. *Omaha,* (1914) an order of the city of Omaha requiring a railroad to build at its own expense a viaduct 810 feet long over its tracks in the heart of the city where, at most, one less than 500 would have accomplished all the requirements of mere safety, was sustained as a reasonable exercise of the police power on the ground that the longer one would no doubt provide an easier grade.

Chicago, Mil. & St. P. v. *Minneapolis, supra,* (1913) was a case in which the city of Minneapolis, desiring to connect with a short canal two small lakes in its park system, for purely aesthetic reasons, took a part of a railroad's right of way, occupied by it for many years, paying for it a few dollars as mere land in the open country, and ordered it to build a bridge over the land so con-

demned, high enough not to interfere with the pleasure canal to be built in this part of the right of way so taken. Sustained as a legitimate exercise of the police power.

In *Munn* v. *Illinois, supra,* the right of a State to prescribe maximum rates for the elevation and storage of grain in elevators owned by private citizens, who had no interest in the railroads connecting therewith, was upheld on the ground that such structures were essential to commerce and transportation though not common carriers or owned by them — upon the ground of public interest on its commercial side.

Wisconsin, etc. Ry. v. *Jacobson,* is the leading and one of the extreme cases in which the right of a State under its police power exercised for purely commercial reasons, to compel a railroad to expend a large sum in building a connection with another railroad, including condemning the necessary land therefor, was sustained, notwithstanding that the connection would mean a distinct loss of business to the railroad so compelled to spend the money, the court saying:

> "Although to carry out the judgment may require the exercise by the plaintiff in error of the power of eminent domain, and will also result in some, comparatively speaking, small expense, yet neither fact furnishes an answer to the defendant in error."

In *Mt. Vernon C. Co.* v. *A. P. Co., supra,* it was held that the right of eminent domain could be exercised by a corporation furnishing electricity for power in taking private water powers and lands which was a proper exercise of the police

power. Justice Holmes in the opinion of the court, remarked:

> *" The inadequacy of use by the general public as a universal test is established."*

In *Atlantic Coast Line* v. *N. Car. Corp. Com., supra,* an order of a State Commission requiring it to run a passenger train which could not possibly pay operating cost, merely for the convenience of a few people, was sustained as a proper exercise of the police power. The court said:

> "As the duty to furnish necessary facilities is co-terminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the service required and the public need for its performance."

In *Erie R. R. Co.* v. *Williams, supra,* it was said at page 700:

> " It is hardly necessary to say that cost and inconvenience would have to be very great before they could become an element in the right of a State to exert its reserved power or its police power."

II

As appears from the foregoing summary of and quotations from some of the cases cited and as would more fully appear from the examination of all of them and the vast number of others which might be added, the exercise of the police power

is divided by sharp lines of distinction into several classes:

(a) In one class are those cases in which tangible physical property is actually taken possession of and applied to other use, as distinguished from compelling a corporation to incur an expense upon or in connection with its business or property.

Such is the exercise of the power of eminent domain, and in those cases fair compensation for the property so taken must be paid (except, of course, where something deleterious to the public health, safety or morals is taken and destroyed, naturally a class by itself).

(b) In another distinct class are those cases in which a general rate of charges is arbitrarily fixed covering the whole business of a public service corporation, or, where that business is both interstate and intra-state, governed respectively by two sovereignties, the State and the Nation, that portion of its business which is so governed by the sovereignty exercising the control in question.

Here of course no compensation for earnings lost by reason of the regulation is allowed, on the obvious theory that what is so cut off does not legally belong to the corporation, so long as it cannot prove that the rates as so fixed will not give it a fair return on the reasonable value of its investment, that minimum return being roughly fixed at 6 per cent net (*Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19).

It being setfled that the business or portion of the business so regulated is either intrastate or

interstate as the case may be, the sole question to be determined is whether the rates fixed will give the minimum fair return on the section of the business so regulated separately considered — that is charged with the separated earnings and credited with the separated costs of that portion. There is a strong presumption that the rates fixed are reasonable and they will be sustained unless the corporation clearly succeeds in proving otherwise, in which latter event the rates will be declared " confiscatory " as a taking of property by cutting off revenue to which the corporation is fairly entitled and the regulation will be declared void. That is the class of cases as to which the *Minnesota Rate Cases, supra,* is now the leading and final authority, it having recently (1913) established the law as above stated.

(c) *The final class within which the present case unquestionably comes embraces all those cases in which a public service corporation is required to do something in aid of the public interest, which will cost it money, with or without adequate compensation therefor, the question of compensation, in this class of cases, being of little more than nominal significance, the expense of carrying such a burden in aid of the public interest being regarded as merely a part of its general cost of doing business, like taxes, coal or rails or the liability for injuries to person or property with or without negligence, and to be considered with these other items in determining whether the general schedules of rates which the corporation is allowed to charge, produce the minimum fair return whenever that question arises. In this class of cases it is universally held that*

whether there are any earnings at all from the particular investment so required, is of little or no consequence. At most the amount of the investment is considered in comparison with the size of the corporation and its total earnings. And as we have already shown, the investment required must be very great indeed in proportion to total assets before the courts will declare the requirement, if within the limits of a state's police power, to be unconstitutional on that account.

The distinctions made are clearly and conclusively drawn in the case above cited and in the quotations therefrom and are obviously sound and necessary. As to this last class, we refer especially to the following decisions of this court:

Noble State Bank v. Haskel.
C. B. & Q. R. R. v. *Drainage Com.*
Mo. Pac. Ry. Co. v. *Omaha.*
Chicago, Mil. & St. P. v. *Minneapolis.*
Atlantic Coast Line v. *N. Car. Corp. Com.*
Erie R. R. Co. v. *Williams.*
Wisconsin R. Co. v. *Jacobson.*
West Chicago Street R. v. *Illinois.*
Atlantic Coast Line v. *Goldsboro.*

In every one of those cases, burdens were imposed for the public benefit costing large sums of money for which no adequate return from the burden itself was possible; in most of which instances there was no return at all and in none of which was any compensation paid by the State.

In *Mo. Pacific Ry.* v. *Kansas, supra,* the court draws the distinction:

> "The first and pivotal question arising is whether the order complained of did anything more than command the railroad company to perform a service which was incumbent upon it to perform as the necessary result of the possession and enjoyment of its charter powers and which it could not refuse to perform as long as the charter powers remained and the obligation which arose from their enjoyment continued to exist."

III

The facts in this case, read in the light of those decisions, present several distinct objects and purposes, each of which is a sufficient justification in itself for this exercise of the State's police power, and all of which together pass beyond mere justification and constitute an overwhelming demand.

We ask this court to consider what some of those purposes and insistent demands were:

(a) The instant conversion of 124 acres of primeval waste into desirable terminal and factory property in the heart of one of the greatest ports, railroad centers and manufacturing districts in the world, utterly useless for such purposes without this exercise of the police power. Remember that in point of potential value and productivity this property exceeds several hundred thousand acres of farm lands, drained or undrained and in parity many millions of them.

(b) The removal of the only obstacle otherwise insurmountable, to the creation on that prop-

erty of a great public service Lake, Rail and Barge Canal Freight Terminal, with 9000 feet of deep water wharfs at the foot of Lake Erie and immediate connection with many trunk line railroads to east and west, by a corporation with its plans perfected, already organized under the State's Transportation Law *which declares its purpose to be a public use for which it may exercise the right of eminent domain* and because of which it is placed under the jurisdiction of the Public Service Commission precisely as a railroad is.

The late Mr. James J. Hill, a great authority, wrote and published a convincing pamphlet to show that the greatest of all commercial and transportation needs of the present and future were adequate terminals, such as this, in great traffic centers like Buffalo, dwarfing into comparative insignificance any need for more railroads through the open country. He further pointed out that the cost and difficulty of obtaining them was becoming greater all the time and would soon become prohibitive. A mere single grain elevator owned by a private citizen is now recognized as a public use subject to regulation under a state's police power. That the conditions in Buffalo require that a vast tract of harbor lands be restored to such uses and be developed therefor is patent.

(c) The provisions of decent, convenient and safe access, in the only manner possible, to this large section of the city, now used, even without such access, by many hundreds of respectable citizens for motorboat houses, boating clubs, many forms of pleasure and recreation and even

for permanent homes — a use which such decent access must multiply many times, especially when it provides also the police and fire protection for which the owners pay and cannot get.

(d) The provision of reasonable transportation facilities to citizens engaged in excavating sand and gravel, a commodity of general use obtainable here in unlimited quantities of excellent quality, enabling them to produce and handle it on their own land with efficiency and economy otherwise impossible. It has never been doubted that providing transportation facilities for a growing industry offering at its start an existing tonnage of 100,000 tons per annum with a probable growth in the immediate future to many times that volume was a public use within a state's police power. Compared with the aerial tramway to give convenient service to one little gold mine or the irrigation ditch to improve one ranch, it bulks very large indeed.

Hence the finding of the trial court unanimously affirmed by the Appellate Division:

> "The construction of the roadway and footpath required by Chapter 666 of the Laws of 1915 was and is necessary for the public interest and for the public convenience."
>
> Finding XXIV (R. p. 65).

IV

The whole vast current of authorities flows to the unanimous and positive conclusion that in cases of this class it is immaterial whether the expenditure required will produce any income at

all, so long as the expense is small in comparison to the total assets and earnings of the corporation.

Upon this point the finding of the trial court unanimously affirmed by the Appellate Division, was:

> "The probable cost of constructing the roadway and footpath required by Chapter 666 of the Laws of 1915 is insignificant in comparison to the assets and annual net earnings of the defendant."
>
> Finding XXII (R. pp. 64–65).

In the Statement of Facts (Point X) at the beginning of this brief, we have called attention to the undisputed and wholly adequate evidence upon which that finding was based, on the theory that while the finding was sufficient in itself upon this appeal, this court might like to know that no injustice was done thereby. An investment of fifteen thousand dollars ($15,000.00) is certainly insignificant when compared to assets of two million three hundred thousand dollars ($2,300,000.00) and annual earnings from tolls alone (the plaintiff-in-error has no locomotives, cars or other equipment except a gasoline-operated street car) of four hundred forty-four thousand dollars ($444,000.00) and net earnings of three hundred forty-four thousand dollars ($344,000.00) applicable to dividends upon its stock of one million five hundred thousand dollars ($1,500,000.00) (making approximately 23% thereon) after the deduction of 7% interest on its bonds and all conceivable maintenance and other charges.

V

But in this case the finding of the trial court *upon ample evidence* unanimously affirmed by the Appellate Division establishes finally for the purpose of this appeal, that the plaintiff-in-error wholly failed to show that it would not receive an adequate return from the required investment separately considered:

> " There is no evidence in the record showing that the investment required by Chapter 666 of the Laws of 1915 would not yield a reasonable return to the defendant."
>
> Finding XXIII (R. pp. 64–65).

The court will find in the statement of Facts (Point XI) an analysis of the evidence on this subject justifying that finding and the refusals of the trial court to find at plaintiff-in-error's request that the investment required would be as much as forty-four thousand dollars ($44,000.00) or that the annual cost would be as much as eight thousand dollars ($8,000.00) or that the annual income would not exceed two thousand five hundred dollars ($2,500.00).

> Requests to Find XXIV, XXVI, XXVII refused (R. pp. 41–42).

There is no question at all that if the plaintiff-in-error could accomplish the impossible task of transferring this case from the class in which the question of return is immaterial to the class in which the rule as to " confiscatory " rates applies, the plaintiff-in-error was required to establish by conclusive evidence that it would not receive an

adequate return, before it could succeed in this action.

Minnesota Rate Cases, supra.

VI

The makeweight contention that this law may be declared unconstitutional as a taking of property without compensation, because empty commercial vehicles are not required to pay tolls, calls for merely passing notice.

As to whether the tolls provided in the Act are reasonable, no issue is raised except in the above particular. The fact that appellant voluntarily *transports* a passenger all the way across its bridge from Buffalo to Canada (about a mile) for five cents (Stafford folios 372–373) is sufficient reason why the tolls fixed for *passing over* 432 feet of the bridge are not contested.

It is highly improbable that defendant will be troubled by drays or motor trucks which run both ways unloaded, or go over to the Island and never come back. Sane people do not use valuable equipment in that foolish way. A round trip, one way loaded is the only reasonable expectation, and for that the Act provides a toll which appellant concedes is entirely reasonable.

Moreover, if the total return will be adequate as the trial court has found, the plaintiff-in-error could not be declared wholly unconstitutional as a taking of property without compensation if it were defective in this minute detail.

And finally, the Act is clearly severable and could not be declared wholly unconstitutional as a taking of property without compensation if it were defective in this minute detail.

VII

In its brief and argument before the Court of Appeals, the plaintiff-in-error went far outside the record in a long argument to create in the minds of the court the injurious and wholly erroneous impression that the Act of 1915 was merely a scheme designed and put through by the owners of Squaw Island to benefit themselves wholly at the expense of the Grand Trunk Railway of Montreal and London, which as plaintiff-in-error's owner gets back its entire investment therein only once in every four and one-half years.

No doubt that attempt will be repeated here. And while the decision of this case is in no wise dependent thereon, we think that as a matter of mere decency and justice to the owners of Squaw Island we may be permitted to say:

(a) That the owners of Squaw Island had nothing whatever to do with the original introduction of the bill in the State Legislature. It was simply the culmination of fifty years of effort on the part of the business men and officials of Buffalo and Fort Erie to get from this bridge the service originally intended. During all that time the Grand Trunk had staved off action by making one promise after another, the excuse for further delay being always that its present main bridge across the river, though designed therefor, could not now carry such a roadway, in addition to the increased weight of railroad trains, but that it had plans for and was about to rebuild its river span and then would provide this roadway. More years went by but the river span is still the same old structure. Being required a few years ago by

the Federal Government to rebuild the section across Black Rock Harbor, it constructed that section in accordance with its plans for a new structure across the river — that is, the Black Rock Harbor span is now a completed part of the new bridge, designed and built to carry a double track and a roadway on each side. The business men thought that the Grand Trunk no longer had any excuse as to that section at least. While the bill was pending, the owners of Squaw Island were called in to present to the Legislature the real facts, which they did, exactly as they have been proved and found by the court in this case, in answer to the violent lobbying and protests of plaintiff-in-error's counsel based on assertions which they have been unable to prove in this litigation when the opportunity to do so was afforded.

(b) Far from trying to get something for nothing out of the plaintiff-in-error or its owner, the owners of Squaw Island both before and after the Act of 1915 was passed, offered orally and in writing to either pay the entire cost of the roadway or to guarantee the receipt by plaintiff-in-error of an adequate return upon its cost and maintenance.

While the plaintiff-in-error will insist that the proof of this fact is not properly in the record, the formal question asked the witness to bring out this fact having been excluded on the ground that the evidence was immaterial, the fact does appear in the record as the sworn statement of the witness who personally knew its truth, hav-

ing made the offer himself, and it is wholly uncontradicted.

Record pp. 141–145.

At least as an answer to the plaintiff-in-error's wild assertions based on no suggestion whatever in the record, it ought to be sufficient.

POINT THIRD

THE FEDERAL GOVERNMENT PREVIOUSLY HAVING APPROVED AND AUTHORIZED THE ROADWAY ARM UPON PLAINTIFF-IN-ERROR'S BRIDGE, CHAPTER 666 OF 1915 CANNOT POSSIBLY CONTRAVENE THE FOREIGN AND INTERSTATE COMMERCE CLAUSE OF THE CONSTITUTION.

I

The State requires the plaintiff-in-error to hang a roadway upon its existing drawbridge across Black Rock Harbor, wholly within the State, connecting two sections of the City of Buffalo, both entirely within the State; the bridge was specially designed to carry that roadway, which can be attached without interference with or interruption to the present railroad traffic over the bridge, or the commerce passing through Black Rock Harbor in boats; the Federal Government had previously approved, consented to and authorized the specific roadway in question, in addition to authorizing such a roadway on the entire bridge from the mainland of New York to the mainland of Canada, before the original structure

was erected and again when the entire bridge was rebuilt some years ago.

Findings XX, XXI, XIV, IX and V (R. pp. 64, 59, 54).

Plaintiff-in-error's Exhibits 25 and 26.

The details thus briefly summarized are fully set forth and discussed in the Statement of Facts (Points I, II, III, IV, VI, VII and VIII). There is no dispute about them — indeed, they were all proved by the plaintiff-in-error and are all included in its requests to find.

No question is raised, or could be, as to the completeness and finality of the Federal authorization of this roadway, first by Congress itself, and then by the Secretary of War as to details left to him by Congress.

Nor is there nor can there be any controversy over the proposition that the Federal Government has no conceivable right or power to *compel* the plaintiff-in-error to build the roadway it had so approved, since it begins and ends and is at all points within the territorial limits of one State and city, and is necessarily provided for and dedicated to intrastate commerce exclusively. Manifestly the Federal power was fully exercised and completely exhausted when, as the guardian of interstate and foreign commerce, flowing over the bridge in railroad cars and under it in boats, it formally and finally determined that the roadway would not interfere therewith and *might be* constructed.

Being the final authority on the question whether this intrastate and intracity roadway

would interfere with interstate or foreign commerce, its decision was conclusive and ended all possibility of controversy on that question:

The State then said to this plaintiff in error:

> "Since the Federal Government has determined this roadway will not interfere with foreign or interstate commerce and has authorized you to build it and has thereby gone to the limit of its authority as to a structure which can serve only intra-state commerce, we now take the matter up where the Federal power and duty ends and ours begins and command you to construct that roadway forthwith."

How can this situation be so twisted as to produce the conclusion that the State in *compelling* the appellant to do precisely what Congress has *authorized and permitted* it to do has acted in *conflict* with the right of Congress to prevent obstructions to interstate and foreign commerce?

By what alchemy or *hocus pocus* can perfect harmony be transmuted into conflict?

The obstruction interposed by the commerce clause to the building of this roadway having been completely withdrawn, so that the plaintiff in error, or the State or city if it owned the drawbridge, could construct it forthwith, how is the commerce clause involved at all in determining whether the State may discipline its creature if it does not exercise the right which it has unquestionably acquired?

II

With a few exceptions, the decisions cited in the last preceding section of this brief establishing

that chapter 666 of 1915 does not contravene the constitutional prohibitions against the taking of property, are cases in which the State had exercised its police power by imposing heavy burdens and serious regulations upon railroads engaged primarily in interstate and foreign commerce. Since the Federal control over navigable streams rests wholly upon the same brief sentence in the Constitution from which Congress derives its power over commerce by land routes, all those authorities are in point here. *They may be summed up in the statement that the State's police power extends over the instruments of interstate and foreign commerce precisely as it does over any other activity within its borders, except where it directly conflicts with a definite and positive exercise by the Federal Government of the supreme control which the Constitution confers upon Congress.* The only exceptions to that rule are such exercises of the police power as are intended on their face to construct barriers against interstate commerce or put it at a serious disadvantage in comparison with commerce within the State's borders.

That exactly the same principles apply to navigable waters, and the interstate and foreign commerce thereon, necessarily follows. It is expressly so held in the following among many decisions:

Cummings v. *Chicago*, 188 U. S. 410;
Lake Shore & M. S. Ry. v. *Ohio*, 165 U. S. 365;
Escanaba Company v. *Chicago*, 107 U. S. 678;

West Chicago Street R. Co. v. *Illinois*, 201 U. S. 506;
Canada Atlantic Co. v. *Chicago*, 210 Fed. 7.

In *Escanaba Company* v. *Chicago*, supra, the court sustained as not contravening the interstate commerce clause an ordinance of the city of Chicago requiring that drawbridges across the Chicago River within that city should be closed during certain hours in each day, and that they should never be opened for more than ten minutes at a time, and that when opened and closed they should remain closed for at least ten minutes.

When the drawbridges were closed under this ordinance navigation of the river was entirely barred thereby to a vast interstate commerce continuously using it.

The court by Mr. Justice Field, said:

> "The Chicago river and its branches must, therefore, be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve and improve their free navigation.
>
> "But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience and prosperity of their people. This power embraces the construction of roads, canals and bridges and the establishment of ferries, and it can generally be exercised more wisely than by a distant authority. They are the first to see the importance of such means of internal communication, and are more deeply concerned than others in

their wise management. Illinois is more immediately affected by the bridges over the Chicago River and its branches than any other State, and is more directly concerned for the prosperity of the city of Chicago, for the convenience and comfort of its inhabitants and the growth of its commerce, and nowhere could the power to control the bridges in that City, their construction, form, and strength and the size of their draws and the manner and times of using them, be better vested than with the State or the authorities of the City upon whom it has devolved that duty. When its power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the State and that of the Federal Government come in conflict, the latter must control and the former yield."

This case is referred to and approved by many subsequent decisions including *Cummings* v. *Chicago*, supra, and has never been overruled or limited in any way.

In *Canada Atlantic Transit Co.* v. *Chicago*, supra, it was held that city ordinances requiring the use of tugs and certain speed in passing through bridges over the same Chicago river was constitutional.

In *West Chicago Street R. Co.* v. *Illinois*, supra, the court sustained as a valid exercise of the police power an ordinance of the City of Chicago requiring a street railroad company to lower its tunnels under Chicago river, a navigable stream, improved by and under the jurisdiction of the Federal Government, to permit a deepening of the channel on account of the increase in

draft of Great Lakes vessels since the tunnel was authorized and built.

In *Cummings* v. *Chicago*, supra, it was held that even where the Federal Government had acquired title to the bed of a stream, the navigable waters of which extended through two States, and had taken entire charge of improving the channel therein, a city in one of the States had the right to prevent the erection of a dock therein without its permission though a permit therefor had been given by the proper Federal authority invested by Congress with power to do so.

In a most exhaustive and comprehensive review of the whole subject of the exercise by States of their police power in matters affecting interstate commerce by Mr. Justice Hughes, speaking for the Supreme Court, all these earlier cases, in that court, and many more, are considered to deduce the principles which the court enunciates and applies to the regulation by the State of intrastate rates on railroads primarily engaged in interstate and foreign commerce, where the Federal Government had previously taken charge of such railways through the Interstate Commerce Commission.

Minnesota Rate Cases, supra.

It is to be noted that the principles enunciated by all of the above decisions, including those referred to in the last section of this brief, go far beyond what an affirmance of the judgment in this case requires. In every instance the State had imposed burdens and regulations upon interstate and foreign commerce in conflict with Federal action or in the absence of a previous approval by Congress of the things required. Here Con-

gress had previously acted and expressly approved and consented to the thing required and the State seeks merely to compel what Congress has so approved."

III

To meet this distressing situation, plaintiff-in-error's counsel is compelled to evolve several wholly new and original theories. The one to which he originally pinned his greatest faith, is this:

That the acquisition by the Federal Government of title to the retaining walls and lands under water, so long as used for a ship canal, created a special and unusual condition of affairs to which normal thinking and general principles established by the decisions do not apply. While it is true that the Federal government being limited to jurisdiction over interstate and foreign commerce could not become vested thereby with the power to *compel* the plaintiff-in-error to build a roadway for intrastate traffic exclusively, the plaintiff-in-error says the State abandoned that power by this conveyance and it simply ceased to exist — except in the general power of the Grand Trunk Railway as its owner.

The mere statement of the proposition condemns it, but we are not left to meet this ghost alone. The exact question was passed upon in:

Cummings v. *Chicago,* 188 U. S. 410.

Congress going through the identical process followed in the case of Black Rock Harbor, set forth in the evidence introduced by plaintiff-in-

error, with painstaking care, made an appropriation in the following language:

> "Improving Calumet River, Ill: Continuing improvement thirty thousand dollars; of which eleven thousand two hundred and fifty dollars *are to be used between the Forks and one-half mile east of Hammond, Indiana.*
>
> "— Provided however that no part of said sum nor any sums heretofore appropriated except the said eleven thousand two hundred fifty dollars for the river above the Forks shall be expended until the entire right of way shall have been conveyed to the United States free of expense and the United States shall be fully released from all liability for damages to adjacent property owners to the satisfaction of the secretary of war."

(Quoted as above in statement of case at p. 4113.)

The required conveyances of the lands under water to the United States were duly made and the new channel was constructed by it.

Though the Calumet river rises in Indiana and the greater part of its course is in that State, its outlet into Lake Michigan is in the city of Chicago in the State of Illinois and the section under consideration in the *Cummings* case was wholly within the limits of that city. The improvements at that point were completed in 1900, and the plaintiff Cummings, immediately afterwards, obtained from the Secretary of War a permit to build a wharf out from the uplands owned by him to the harbor line established by that official. On starting work the plaintiff was stopped by the city officials on the ground that the plaintiff had

not obtained also a permit from the city of Chicago as required by its ordinances, and this action was then brought to enjoin that interference by the city.

The court affirmed judgment dismissing the bill, saying:

> "The general proposition upon which the plaintiffs base their claim to relief is that the United States by the acts of Congress referred to and by what has been done under those acts has taken 'possession' of Calumet River, and so far as the creation in that river of structures such as bridges, docks, piers and the like is concerned, no jurisdiction or authority whatever remains with the local authorities."
>
> * * * * * * *
>
> "Did Congress * * * intend by the legislation in question to supersede, for every purpose, the authority of Illinois over the erection of structures in navigable waters wholly within its limits."
>
> * * * * * * *
>
> "These questions were substantially answered by this Court in *Lake Shore & Michigan Railway* v. *Ohio,* decided in 1896. That case required a construction of * * * the River and Harbor Act of September 19, 1890. In that case this court said * * * 'The mere delegation to the Secretary of the right to determine whether a structure authorized by law has been so built as to impede commerce, and to direct when reasonably necessary, its modification so as to remove such impediment does not confer upon that officer power to give original authority to build bridges, nor does it presuppose that Congress conceived that it was lodging in the Secretary power to that end.' * * * The

mere delegation of power to direct a change in lawful structures * * * cannot be construed as conferring on the officer named the right to determine when and where a bridge may be built.'

"The decision in *Lake Shore & Michigan Railway* v. *Ohio*, was rendered before the passage of the River and Harbor Act of 1899, but the tenth section of that Act, upon which the permit of the Secretary of War was based, is not so worded as to compel the conclusion that Congress intended by that section to ignore altogether the wishes of Illinois in respect of structures in navigable waters that are wholly within its limits.

* * * * * * *

"Whether Congress may, against or without the expressed will of a state, give affirmative authority * * * to erect structures in such waters, it is not necessary in this case to decide. It is only necessary to say that the Act of 1899 does not manifest the purpose of Congress to go to that extent * * * The effect of that Act reasonably interpreted, is to make the erection of a structure in a navigable river within the limits of a State dependent upon the concurrent or joint consent of both the National Government and the State government. The Secretary of War * * * may assent to the erection * * * of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must before proceeding under such an authority, obtain also the assent of the State."

The River and Harbor Act of 1899 here considered and construed is the very statute on which the plaintiff-in-error relies — there has been no change in the law since that time.

It will be noticed that the *Cummings* case goes much further than the facts in this case require. *There the question was whether the local authorities could interfere and prevent the enjoyment of a license from the Federal Government to build a wharf in an interstate stream improved by the Federal Government and the bed of which was owned by it. Here the State seeks only to compel the exercise by plaintiff-in-error of the privilege granted it by the Federal Government.*

The attempt of appellant's counsel to distinguish the decision in the *Cummings* case from the case at bar, on the ground that Calumet river is wholly in the State of Illinois, is quite as careless as the enunciation of its preposterous theory in ignorance of that decision. For as shown by the very statement of facts in the *Cummings* case, the Act in question provided for the improvement of that river to a point in the State of Indiana "*one-half mile east of Hammond, Indiana.*" So the navigable waters of the Calumet River must have extended at least that far into Indiana. A reference to any map of Illinois and Indiana will show that the Calumet river rises and runs for most of its course in the latter State, only a short section at the outlet being in Illinois.

Century Encyclopedia, Vol. X, Map of Illinois and Indiana.

Moreover, it could not make any possible difference in the force of this decision on the point that the acquisition by the Federal Government of the bed of a stream does not affect the State's police

power over that stream, whether it was wholly within the State or not.

The emphasis which the plaintiff-in-error has given to this detail merely serves the purpose of showing the absolute completeness of the parallel, assuming that what has been, for nearly a century, an artificial basin, wholly within the State and under its undisputed ownership and control, with a water level four feet above the Niagara river, is really a part of a navigable stream, not wholly within that State.

IV

The plaintiff-in-error's other reason why the situation here does not permit of normal reasoning, is that the termini of the bridge being on the mainland of Canada and on the mainland of New York, and its sole business up to date having been to provide railroad facilities between those two points, its sacred dedication to foreign commerce cannot be "burdened" now by intrastate business. A wholly sufficient answer to that sophistry lies in its express covenant, contained in the deeds (put in evidence by the plaintiff-in-error) of the strip of land across Squaw Island on which one-third of its whole structure rests, to provide such service for the owners of that Island not only for ultimate use but for its improvement. If this were a "burden," it is part of the original cost of the bridge itself, and essentially reduced instead of increasing the "burden" which interstate commerce must bear. And it is a prior and superior obligation to any incurred to interstate or foreign commerce and to its obligation to earn

for the Grank Trunk Railway 23 per cent per annum. Another completely adequate answer, is that the evidence and findings in this record establish that plaintiff-in-error's theoretical " burden " has no actual existence whatever, so far as interstate and foreign commerce are concerned.

The only conceivable " burden " falls on the Grank Trunk Railroad in that its additional fifteen thousand dollars ($15,000.00) investment may, theoretically, earn only 6 per cent per annum, whereas its present investment of one million five hundred thousand dollars ($1,500,000.00) earns 23 per cent per annum.

POINT FOURTH

THE ENTIRE ARGUMENT OF THE PLAINTIFF-IN-ERROR AS DEVELOPED IN ITS BRIEF, IS AN ATTEMPT TO BRING THE ISSUES IN THIS CASE WITHIN THE PURVIEW OF LEGAL PRINCIPLES WHICH HAVE NO BEARING UPON THE FACTS THIS RECORD DISCLOSES.

I.

Under their first point the learned counsel for plaintiff-in-error call attention to many decisions to establish the general proposition that a state may not take away a franchise granted by it or impose burdens not included in the terms of the original franchise even where the right to alter, amend or repeal was expressly reserved. Assuming this general rule to be still in full force, it is subject to many limitations and exceptions where the rule comes in conflict with the exercise of the State's legitimate police power which must dominate or government would utterly fail,

through the multiplicity of exemptions so created by innumerable franchises. These limitations and exceptions are based on the sound theory that all grants of franchises are subject to the reasonable exercise of the police power both by necessary implication and also because the legislature has no power to divest the sovereignty of that attribute.

Hence the many instances to which we have called attention (Point Second) where the imposition of great burdens upon corporations has been sustained, as in aid of the public interest, and our contention that the present case clearly belongs in that class.

Moreover, their exhaustive argument is beside the case because, as we have urged upon the attention of this court, no franchise is taken away and no burden is imposed within the meaning of the decisions cited by counsel for the plaintiff-in-error. The only franchise granted was to build a bridge *for railroad cars and for vehicles and foot passengers* — neither right has been prohibited or affected by the Act in question. And the cost of the required improvement being insignificant in proportion to the capital and earnings of the plaintiff-in-error, it being for the public interest, and there being no evidence that it would not produce an adequate return on the investment required, no burden was imposed.

And finally, whether, as the Court of Appeals has decided and we contend, the consolidation act substituted the word *shall* for the word *may* as to building a roadway on the bridge, or the grant of the franchise is permissive both as to railroad and as to roadway, the obligation to exercise the

franchise completely, when accepted, is one which the State had a right to enforce as it did by the Act of 1915 — in either view the obligation imposed is not even one of those insignficant burdens which courts characterize as not burdens in law though confessedly such in fact.

(2) The ingenious and laborious effort to show that this court is bound to follow the Canadian decision in interpreting the word *shall* to mean *may*, is wholly wasted because the Canadian court did not so decide as we have clearly established and also because no court has power to interpret *shall* to mean *may*.

(3) The argument that the Consolidation Act caused no change in the situation — that the corporation and the bridge both remained two distinct entities, each ending abruptly in the middle of the river — is an impracticable absurdity. The whole object of the Consolidation Act was to create one corporation with all the rights and all the duties of both its predecessors and one bridge based on and controlled by one law.

(4) The contention that giving service to Squaw Island is an imposition upon the corporation and a burden on interstate and foreign commerce, is utterly insincere. The New York Legislature does not forbid the completion of the roadway to Canada if the plaintiff-in-error so elects. The plaintiff-in-error paid for its valuable right of way by a grant of the right to connect with and use the rails and roadway on the bridge — the "burden" was voluntarily assumed, pre-dates the bridge and resulted in a great saving instead of a burden to both the plaintiff-in-error and

interstate and foreign commerce — supposing the benefit is ever given to the public instead of to the Grand Trunk Railway. There is nothing in the franchise which forbids the plaintiff to make this agreement and give such service to intermediate points. And the plaintiff-in-error surely cannot be allowed to say that the agreement by which it obtained the right of way on which 1,200 feet of its structure rests was invalid, while it retains and uses that right of way. While the plaintiff-in-error and its owner the Grand Trunk Railway may be willing to take advantage, if it can, of such an obvious fraud, the government and people of the United States should not be made a party thereto through an obviously hypocritical plea, in their name, for the sole benefit of this corporation.

(5) As to the change in tolls, there is nothing in the evidence to show that those provided in the Act of 1915 are not sufficient to furnish an adequate return on the investment required and the trial court so found. The burden was on the plaintiff-in-error to produce such evidence as a condition of being allowed to be heard on that phase of the matter.

Minnesota Rate Cases, supra.

The attempt to do that now as a mere matter of scholastic argument based on the provision for tolls in the original act cannot be listened to. Moreover, it is obviously weak, specious and wholly unconvincing. For the old tolls were for passage across the entire bridge a distance of some 3,500 feet while these tolls apply to passing

over only 435 thereof; and the small use of the bridge in the early days, while the population at each end was small, naturally justified much larger tolls than the vast volume of traffic which is strikingly illustrated by the fact that the growth in traffic by rail has made the tolls fixed at the same time for railroad cars enormously profitable — 23% net per annum notwithstanding the increased cost of materials and labor to which counsel so earnestly refers.

(6) The plea in behalf of the bridge company bondholders is amusing in the light of the undisputed evidence. There is a margin in annual net profits of something over three hundred thousand dollars ($300,000.00) after every conceivable charge for maintenance and depreciation, the payment of interest on the seven hundred thousand dollars ($700,000.00) in bonds, the building of this roadway out of one year's profits and provision for its annual maintenance, if there were no income whatever derived from that roadway — enough to take up the entire principal of the bonds in two and one-half years. Suggesting that bondholders' rights are injured is pure hypocricy. Also, one of the chief assets in securing bonds is the right of way across Squaw Island, the contract for which, providing access and use of the bridge as the consideration, antedates the bonds and was a chief inducement for the purchase thereof. Do the bondholders also wish to take part in the attempted fraud, especially where no possible gain to them can accrue? If so, it must be solely because the bonds are all owned by the Grank Trunk Railway, which also owns all the stock.

II.

As to plaintiff-in-error's second point, we desire to observe:

(a) That the question has been discussed already in considering its first point.

(b) That the question is not an issue before this court, since there is no evidence in the case tending to show these tolls would not produce an adequate return upon the investment, and the trial court so found.

III.

As to the third point in the brief of plaintiff-in-error, we wish to point out:

Neither the trial court nor the Appellate Division nor the Court of Appeals committed the error which counsel so violently attacks.

The only use made of the assets and earnings of the plaintiff-in-error was to establish, as was done overwhelmingly, that the cost of this improvement was insignificant in proportion to the assets and annual net earnings of the corporation —the most important elements in the consideration and determination of this case.

IV.

As to Points IV, V, VI and VII of the brief for plaintiff-in-error, we would point out:

(a) Action by the State in opposition to the Federal Government, or even independently thereof, is not an issue in this case.

The State required that this roadway be built only after the Federal Government had authorized the plaintiff-in-error to construct it.

The Federal Government's powers were com-

pletely exercised and exhausted when it told the plaintiff-in-error it might build this intrastate roadway.

The action of the State in ordering it built, in accordance with Federal permission already granted, cannot be construed by any stretch of the imagination into an invasion by the State upon Federal prerogatives — there can be no conflict of authority where both governments agree and are acting in perfect harmony.

(b) Admitting for the sake of argument that the Federal Government may assume absolute and exclusive jurisdiction over the instrumentalities of interstate and foreign commerce, whether navigable streams or railroads and bridges, and that thereupon the jurisdiction of the State over those instrumentalities, the lands used therein and the powers and corporations operating or using those instrumentalities or entering upon such lands would entirely cease, and they would be utterly freed from the exercise of the State's police power or any other exercise of its sovereignty, the fact remains that the Federal Government has not assumed such jurisdiction either generally or in this particular case.

We have covered this question so fully and conclusively under our Point Third that further discussion here would be mere useless repetition. We wish merely to point out that the exhaustive argument of the plaintiff-in-error tends only to establish what the Federal Government *might* have done or might do, and therefore has no application to the present case.

(c) The grant by the State to the Federal Gov

Supreme Court of the United States

OCTOBER TERM, 1919

No. [redacted]46

INTERNATIONAL BRIDGE COMPANY

PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

DEFENDANT IN ERROR.

REPLY BRIEF FOR PLAINTIFF IN ERROR

MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Plaintiff in Error.

ADELBERT MOOT,
Of Counsel.

Supreme Court of the United States

INTERNATIONAL BRIDGE COMPANY,
Plaintiff in Error,

AGAINST

PEOPLE OF THE STATE OF NEW YORK,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR

I.

As we read the brief for the State of New York, or its creatures the corporations owning Squaw Island, we are moved to ask why that brief neither discusses, nor really attempts to answer, one of the main questions in this case. As we see it that question is whether the State of New York can now forcibly change the east end of an international bridge that is about half a century old and has never carried a ton of freight that was not international freight, and now make it into an intrastate bridge that is to carry at least 100,000 tons of sand and gravel annually for the Squaw Island Corporations alone, and that may have to carry, it is suggested, two or three times that amount?

Nor is this all. Why does not counsel at least mention the Act of Congress of June 23, 1874, by which "modification in the plans of the bridge

authorized on the 30th day of June, 1870 * * * are hereby approved and said bridge as constructed is declared to be a lawful structure?" Probably that important statute is not mentioned because it is thought that like silence in the Court of Appeals caused that court to overlook that statute and decide this case in favor of counsel's clients. But that statute is in effect an amendment to all state and Canadian statutes as well as to the Act of Congress that had gone before.

It is true those statutes authorized the Bridge Company to build a bridge "as well for the passage of persons on foot and in carriages and otherwise as for the passage of railroad trains," but when the bridge was built for railroad trains only, and then the only power that could and did give a valid franchise to build the bridge across the Niagara from Buffalo to Canada, said "the modification in your plans" is "approved," and your bridge is a "lawful structure,"—what is left of any argument rested upon the language quoted from the earlier statutes about a bridge for "persons on foot and in carriages" on their way from Canada to Buffalo, or Buffalo to Canada? Mark, it was never to be a mere Squaw Island bridge. What power had the legislature of New York, in 1915, to amend the Act of Congress of June 23, 1874? And is not Chapter 666 of the Laws of New York for 1915 in effect an amendment to the Act of Congress of June 23, 1874?

This is the first case we can find involving a bridge across a river that is an international boundary. What power, aside from the national power, has any right whatever to say such a river may be bridged, or upon what terms, or whether such a bridge shall be one for persons and carriages, or

railroad trains, or both? Is the case of a river that is an international boundary at all comparable to one involving building a dock, or bridge, wholly within a state, even if the river runs through two or more states. Does not the necessarily exclusive jurisdiction of the National government render all attempts of any governmental agency of New York, executive, legislative or judicial, to require an international bridge to be so altered as to change one end of it into a domestic bridge, *ultra vires?*

II.

The covenants in deeds granting right of way across Squaw Island have no bearing on this case.

It is claimed that the Bridge Company is obligated to give access to Squaw Island by a clause in the deeds by which it acquired its right of way across the Island. Upon examination of these deeds, executed in 1871 and 1874 respectively (Exhibits 7 and 8), it will be seen at once that they give to the grantor only "the right *in common with the public at large* to use the bridge * * * *upon paying therefor the tolls and charges allowed by law*" (*i. e.* the tolls fixed by the Act of Incorporation in 1857 and approved by Congress in the Act of 1870, and set out on page 35 of our brief), and permit the grantor to make the necessary rail and other connections *at its own expense* in such a manner "as shall not interfere with the regular business of such bridge."

These deeds may confer upon the owners of Squaw Island the right to connect at their own expense with the tracks across the bridge, assuming that the Bridge Company had power to grant such

right in view of the fact that its franchise did not authorize it to construct and maintain a bridge from Buffalo to Squaw Island, nor a bridge from Canada to Squaw Island, and provided that the United States Government will permit such a connection, and assume the burden of maintaining a customs house and immigration office on Squaw Island.

If at some future time a roadway and footpath shall be constructed across the bridge to Canada, it may be that the owners of the Island will also have the right to connect therewith at their own expense subject to the same conditions. But it is evident that these clauses confer no special and peculiar right on the owners of the Island to require the construction of such roadway and footpath at the expense of the Bridge Company for the exclusive benefit of their property. The Bridge Company did not covenant to alter its bridge or to build a roadway for the benefit of Squaw Island, as it is required to do by Chapter 666 of the Laws of 1915, and the deeds have no bearing upon the present controversy, *otherwise the act in question was unnecessary.*

The second of these deeds (Exhibit 8) from the same grantor, and containing the covenant relied on by counsel, was executed on August 6, 1874, which was after the bridge had been completed as a railroad bridge only, and after it had been declared by Congress to be a lawful structure *as constructed* (Act of June 23, 1874, Chapter 475). So counsel's argument that a roadway to Squaw Island was the consideration for the Bridge Company's right of way fades into nothingness. There is no question of good faith involved. The Bridge Company did not undertake to "provide service" for

Squaw Island, but merely to permit the owners of the Island to make connection with its bridge at their own expense and use it on the same terms as "the public at large." As the public at large has never been permitted to use the bridge for pedestrian or vehicular traffic, the owners of Squaw Island have no right to do so. As the owners of Squaw Island have never connected with the tracks at their own expense, the covenant has never gone into operation. If they should make such connection in the future, and the Bridge Company should exclude them from its tracks, their remedy, if any, would be an action on the covenant for damages—not an Act of the Legislature prescribing penalties.

III.

The brief of the defendant in error is misleading in its references to the earnings of the Bridge Company.

Counsel lays great stress on the supposed enormous earnings of the International Bridge Company, and assumes that such earnings are available for distribution to stockholders. The fact is that the surplus earnings of the Bridge Company constitute a depreciation reserve, which is essential to provide for the periodical rebuilding of the bridge necessitated from time to time by increased traffic, and which may be required at any time by the Secretary of War. The bridge was completely rebuilt to accommodate increased traffic in 1899, twenty-five years after its original construction. Twenty years have now elapsed since that time, so it is reasonable to presume that it must again be rebuilt in the near

future. In addition the Black Rock Harbor draw was renewed a second time, in 1907, at the command of the Secretary of War.

IV.

The judgment cannot be sustained on the basis of the Trial Court's refusals to find.

Counsel claims in his brief (pages 21, 28, etc.), that the refusal of the Trial Court to find as requested by plaintiff in error amounts to a finding by the Court in favor of the contention of the defendant in error, although no such finding was made by the court, and attempts to justify the decision on the basis of such non-existent findings.

Counsel is in error as to the rule. Under the New York practice a refusal to find as requested is not equivalent to an affirmative finding to the contrary. Judgment must be based on facts found, not facts refused.

Morehouse vs. Brooklyn Heights R. R. Co., 185 N. Y., 520, 527.

Galle vs. Tode, 148 N. Y., 270, 277.

Meyer vs. Amidon, 45 N. Y., 169, 171.

V.

The Federal Government has never authorized plaintiff in error to construct a bridge to Squaw Island, and has never determined that such a bridge would not interfere with foreign and interstate commerce.

The statements in this respect found on pages 67 and 84 of the brief for defendant in error are misleading. Presumably these loose statements refer to the approval of plans for the reconstruction of the Black Rock Harbor draw by the Secretary of War. These plans show in dotted lines "Provision for future roadway," followed by the explanation, "Roadway shown in dotted lines not to be put in at present, but provision is made in the design of the bridge for its future construction." *No provision was made in these plans for access to Squaw Island,* and the structure was completed without the roadway as indicated by the note upon the plans, and was accepted by the Secretary of War. (Findings XIV and XV, pages 61 and 62.)

When these plans were prepared it was thought that at some future time a roadway might be constructed across the bridge from Buffalo to Canada, and the plans for the Black Rock Harbor draw were made so that such a roadway might be attached without requiring the rebuilding of that portion of the structure.

In view of the note stating that the roadway was not to be put in at that time, it is doubtful whether the Secretary of War was required to approve the roadway feature even in relation to the possible obstruction of navigation. Certainly the approval had no effect beyond this. The Secretary of War was not called upon to consider the effect upon commerce passing over the bridge.

This court has said in a case quoted in our opponent's brief:

> "The mere delegation to the Secretary of the right to determine whether a structure authorized by law has been so built as to impede commerce, and to direct, when reasonably neces-

sary, its modification so as to remove such impediment, does not confer upon that officer power to give original authority to build bridges, nor does it presuppose that Congress conceived that it was lodging in the Secretary power to that end."

Lake Shore & Michigan Ry. vs. Ohio, 165 U. S., 365, 368.

This decision leaves the power to authorize bridges over waterways wholly within a single state in the State Government, and the power to authorize bridges over interstate and international streams, such as the Niagara River, in Congress.

Luxton vs. North River Bridge Co., 153 U. S., 532.

Mr. Kellogg, the special counsel for the state, who drew the brief in this case, manifests a certain obsession in regard to Squaw Island. He has been for many years counsel for the persons interested in Squaw Island in all their numerous corporate disguises, is himself personally interested in the development project, and was the chief witness for the state upon the trial of this action. How far his zeal has carried him beyond the prosaic realm of fact and reason, as well as the visionary character of the various Squaw Island development projects is abundantly illustrated in his brief.

Thus we are told that the development of Squaw Island as a lake, rail and barge canal terminal, and "the instant conversion of 124 acres of primeval waste into desirable terminal and factory property in the heart of one of the greatest ports, railroad centers and manufacturing districts in the world,"

etc., etc., awaits only the construction of this roadway (brief, pages 20, 58, 59), and we are told earlier in the brief that a roadway twelve feet wide, costing but little over $10,000.00, will be entirely adequate for these extensive purposes, and will fulfil all requirements of the statute (Brief, pages 15 to 17), although the state's engineer witness admitted that such a roadway would not permit the passage of two automobile trucks without overhanging the footpaths to such an extent as to risk pushing pedestrians off the bridge. (Record, page 162.)

Again counsel assures us that Squaw Island is to be used for this great lake and rail terminal with extensive deep water wharves and numerous factory sites, and in the next breath, and without a smile, tells us that the island is to be excavated, and the sand and gravel of which it is composed is to be removed and carried across this twelve-foot roadway to be used for building materials in the City of Buffalo (Brief, pages 26, 27, 58 and 60).

Of course, this case does not turn upon the apparent interest of the Squaw Island corporations in it, but the beautiful camouflage thrown up by the witness-counsel to screen his clients in this litigation, and written into the statute in question is really amusing. The whole argument of counsel shows the statute fits these clients like a glove, but how the statute came to fit them so well, unless it was made to order by some lawyer for that purpose, does not appear. No! The owners of Squaw Island had nothing to do with this legislation, except that "the owners of Squaw Island were called in (by whom? why?) to present to the Legislature the real facts" (Counsel's brief, page 65) and the result, of course, was the act in question and this action. And so we had the testimony of counsel showing his clients and their ten-

ants were alone interested in Squaw Island, and are really the "People" here in this litigation (Record, 134 to 159). Outside his own clients, counsel cannot spy a business man, or even one lone fisherman, interested in this case.

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